

HOMELAND SECURITY VS. WORKERS' RIGHTS? WHAT THE FEDERAL GOVERNMENT SHOULD LEARN FROM HISTORY AND EXPERIENCE, AND WHY

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“The Congress finds that experience in both private and public employment indicates that the . . . right of employees to organize [and] bargain collectively . . . safeguards the public interest [and] contributes to the effective conduct of public business.”

– Federal Service Labor Management Relations Act (1978)¹

1. 5 U.S.C. § 7101(a) (2000).

"Do we really want some work rule negotiated prior to 9/11 to prevent us from finding somebody who is carrying a bomb on a plane with your momma?"

– Senator Phil Gramm (R-Tex.) (2002)²

In the aftermath of the horrific attacks of September 11, 2001, outside observers might have been puzzled as to why a push to remove workers' rights delayed the creation of the Department of Homeland Security (DHS) for several months. Specifically, the Bush administration and its Congressional allies would not approve a bill creating the DHS unless the President and administration officials were empowered to design a new personnel system that allowed them to eliminate collective bargaining rights and civil service protections for the approximately 170,000 workers coming into the DHS.³ Notably, about 48,000 of these workers had previously enjoyed bargaining rights in predecessor agencies.⁴

This issue has wide implications. The administration has already implemented or proposed similar rules to remove collective bargaining and related rights in other parts of the federal government, such as the Transportation Security Administration (TSA), the vast Department of Defense (DOD), and, still in the name of national security, some workers at the Social Security Administration (SSA).⁵ In turn, policies that affect hundreds of thousands of federal employees are likely to affect all American labor relations. The strike by the Professional Air Traffic Controllers Organization (PATCO) in the 1980s was a bellwether for private sector labor policies in that era.⁶ Most fundamentally, the DHS debate showed a deep division in how unions are generally viewed: either as useful protectors of worker rights or as obstacles to effective management. For decades, the statutory pronouncements of Congress and most state legislatures have favored collective bargaining in private and public employment. Now this principle is under attack.

During these unprecedented attempts to undo established rights, the

2. 148 CONG. REC. S8710 (daily ed. Sept. 18, 2002).

3. Marick F. Masters & Robert R. Albright, *Labor Relations in the Department of Homeland Security: Competing Perspectives and Future Possibilities*, 54 LAB. L.J. 66, 68-70 (2003).

4. *Id.* at 66-75; Derrick Cain, *Union Rights, Personnel Flexibility Gridlock Dims Hope Senate Will Pass Homeland Bill*, 40 Gov't Empl. Rel. Rep. (BNA) No. 1978, at 951 (Oct. 1, 2002).

5. See *infra* Section IV (explaining that the TSA is now part of the DHS, but it was not when these rights were removed).

6. See, e.g., Charles McDonald, *U.S. Union Membership in Future Decades: A Trade Unionist's Perspective*, 31 INDUS. REL. 13, 15 (1992) ("In 1981, President Reagan constructed a union-avoidance theme when he annihilated the air traffic controllers and their union . . ."); David L. Gregory, Book Review, 53 GEO. WASH. L. REV. 680, 681-83 (1985).

debates were compartmentalized and ahistorical, leading to conclusions that were uninformed and arguably, demonstrably wrong. The debate was compartmentalized in that it ignored the experiences of unions outside the federal government: both unions in the private sector and the diverse experiments in public sector labor relations at the state and local level in the past forty years. Policymakers also ignored the literature demonstrating that unions often improve productivity. Instead, policymakers did little more than parrot questionable anecdotes about some federal workplaces.

The discussions were ahistorical in that they rehashed—with no apparent awareness—stale arguments about the role of unions in government that date from the first half of the twentieth century. Astonishingly, policymakers ignored how the theory and practice of public sector labor relations in the second half of the century have addressed outmoded concerns that worker rights are incompatible with efficient public service and accountability. Thus, the debate was not informed by a tremendous amount of available, relevant evidence from history and experience: evidence of actual experiences under a variety of legal regimes that allow collective bargaining, and evidence of how public sector employment functioned where civil service and bargaining rules were weak or nonexistent.

Because of this, policies crucial to the future of worker rights and the provision of government services—including those relating to public safety—risk retreating into a past that legislatures and the public have largely rejected. Since 1959, no group of workers in the United States has lost the right to bargain collectively under the National Labor Relations Act (NLRA),⁷ the law governing private workers. Moreover, public workers at all levels of government have enjoyed greatly expanded collective bargaining rights, albeit under diverse state and local rules.⁸ Those arguing for an unprecedented reversal of this trend for a significant part of the federal sector should have the burden of showing why this trend has been in error or is inapplicable in this case. The history and experiences of other unionized workers shows that the opposite is true. For example, assertions that bargaining is inappropriate where public safety is involved should be tested against the reality that collective bargaining is common in police and

7. 29 U.S.C. § 151 (2000).

8. In 2002, the Government Accounting Office (GAO) reported that about three-quarters of the civilian workforce (103 million people) have some form of collective bargaining rights under federal, state, or local laws. Of those that do not, most are independent contractors (8.5 million), certain employees in small businesses (5.5 million), supervisors and managers (10.2 million), and certain public employees (6.9 million). *Collective Bargaining Rights, Information on the Number of Workers with and Without Bargaining Rights*, GAO-02-835, 2-3, 14-16 (Sept. 13, 2002) [hereinafter GAO, *Number of Workers with and Without Bargaining Rights*].

fire departments.

More broadly, public sector labor law is an excellent example of states acting as "laboratories of democracy." The United States has more than forty years of experience with various public sector bargaining laws at the federal, state and local government level, including laws covering public safety workers. Federalist conservatives and liberals should agree that, in crafting a federal sector law, we should learn from the best practices of labor relations developed in the states. Equally relevant, prior to 1959, public sector unions had existed uneasily for decades with no legal right to bargain collectively. Before returning to this old legal regime, we should understand how it worked in practice and why it has been rejected.

This article will argue that history and experience show that those who would deny rights to workers in the name of national security have the alleged "cost-benefit" analysis wrong. Not only do they rely on archaic stereotypes that falsely assume a tradeoff between workers' rights and efficiency, they also undervalue the importance of collective bargaining rights. Policymakers should recognize that the right to form unions is widely recognized (at least outside the United States) as a basic human right. The right to unionize allows workers the effective ability to participate in and influence decisions that affect their lives in vital ways.⁹ Happily, the evidence shows that granting these rights to federal employees is in no way inconsistent with national security needs. Unhappily, the evidence has thus far been ignored.

These issues are especially important because labor and employment policies are still being developed at the DHS, DOD, and elsewhere. This article describes what the history of public sector labor relations and studies of unions can bring to the ongoing discussions about the formulation of these policies. It calls for a less compartmentalized view of labor relations. It is a uniquely American habit to separate public and private sector labor policies so distinctly and to segregate rules for different government jurisdictions so completely.¹⁰ But separating policies for the DHS and certain other federal workers from the history and experience of labor relations has led to dangerously uninformed policies and proposals. The federal workplace is not unique, not even to the extent that some parts of it

9. See James A. Gross, *A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 65, 66-70 (1999) ("The essential question the paper attempts to answer is whether the fundamental human right of freedom of association is being violated in the content and application of United States labor relations law.").

10. See Joseph E. Slater, *The Court Does Not Know "What a Labor Union Is": How State Structures and Judicial (Mis)Constructions Deformed Public Sector Labor Law*, 79 OR. L. REV. 981, 1027-28 (2000) ("The development of American public sector labor law on such an entirely different track than private sector law is not at all 'natural'; it is in fact exceptional.").

have significant responsibility for public safety.

Part I of this article puts the federal sector issues in the context of the increasing importance of public sector labor relations. Part II outlines the evolution of modern federal sector bargaining and civil service laws. Part III tracks the developments in the DHS and other parts of the federal government where collective bargaining and civil service rights have been challenged. Part IV describes the mistakes and omissions in the DHS and related debates, placing them in a broader historical context. This section notes the recurrence of discredited arguments from the first half of the twentieth century, describes the problems that existed in the earlier era, and explains how the law over the past four decades has addressed these concerns. It also shows that modern "industrial relations" studies of the effects of unions on productivity contradict the outdated stereotypes which opponents of bargaining rights promoted. Part V discusses related points involving civil service rules. Since the outcome of current debates over federal employee rights remains unresolved, this article proposes the types of data that policymakers should consider.

I. THE IMPORTANCE AND DIVERSITY OF PUBLIC SECTOR LABOR LAW

Collective bargaining in the federal sector is part of public sector labor relations. In turn, the public sector is an increasingly important part of all U.S. labor relations. From the mid-1950s to the 1990s, private sector union density declined from more than 33% to less than 12%. In contrast, from the early 1960s to the 1990s, public sector union density rose from less than 13% to around 40%. Also, today about 40% of all union members are public workers.¹¹ Federal workers are a sizable part of these figures. Paul Light of the Brookings Institution has estimated that their numbers will soon rise to two million because of increased need for airport screeners, air marshals, border agents, and immigration inspectors.¹² Indeed, since September 11, 2001, civilian employment in the federal government has risen by 4.5%.¹³

America is unique among industrialized democracies in sharply

11. In 1953, union density was 35.7% in the private sector and 11.6% in the public sector. By 1996, the private sector rate was 10.2% while the public sector rate was 37.7%; the public sector rate has remained around 40% since. Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor's Decline*, 16 HOFSTRA LAB. & EMP. L.J. 133, 160 (1998); see also Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 361-62 (2002) ("Today union density is less than half what it was in 1950.").

12. *U.S. Move to Open Gov't Jobs to Competition Angers Unions*, DOW JONES INT'L NEWS, Nov. 15, 2002.

13. Ann McFeathers, *'Watchers' are 40% of Homeland Security*, THE BLADE (Toledo, Ohio), Aug. 25, 2003, at 1.

differentiating legal rules for public and private sector labor relations. Before the 1960s, the law everywhere in the United States prohibited strikes and almost all collective bargaining in government employment, and courts routinely upheld bans on union membership itself.¹⁴ This “pre-collective bargaining era” for public workers in the United States lasted decades beyond when public workers in Britain and France won bargaining and related rights quite similar to those of private sector workers in those countries.¹⁵

The public sector labor laws that have developed in the United States in the past forty years vary tremendously. It has been estimated that now “more than 110 separate state statutes govern public sector labor relations, augmented by many local ordinances, executive orders, and other authority.”¹⁶ Currently, twenty-nine states and the District of Columbia allow collective bargaining for all major groups of public employees; thirteen states allow only one to four types of public workers to bargain (most commonly teachers and firefighters); and eight do not allow any public workers to bargain.¹⁷ Thus, a clear majority of states allow government employees of all types to bargain, and an overwhelming majority of states allow at least some public sector bargaining. While only twelve states allow any public workers to strike, of the states that allow bargaining but not strikes, most require binding arbitration to settle bargaining impasses.¹⁸

This unique history and these diverse modern experiences have created a treasure-trove of information regarding the effects of various types of rules on public workers and employers that should be used in deciding how or whether to create new labor relations systems in federal employment. Yet policymakers have thus far failed to integrate lessons from private or public sector labor relations into the debates over the DHS and other agencies.

14. See JOSEPH SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE*, 1900-62, 71-97 (2004).

15. See *id.* at 92-93.

16. RICHARD C. KEARNEY, *LABOR RELATIONS IN THE PUBLIC SECTOR* 58-59 (3d ed. 2001).

17. See *id.* at 62, 66 (describing which employees can bargain collectively). Estimates on the number of laws vary somewhat; see, e.g., *COLLECTIVE BARGAINING IN THE PUBLIC SECTOR: THE EXPERIENCE OF EIGHT STATES* 5, 8 (Joyce M. Najita & James L. Stern eds., 2001) (stating that there were over ninety public sector statutes; thirty-four states had bargaining laws covering “all or some occupational groups,” six states “authorized other forms of representation and bargaining,” and ten had “no such authorizations”).

18. See KEARNEY, *supra* note 16, at 236-37, 262-65 (showing which states do not allow strikes but do require binding arbitration).

II. THE DEVELOPMENT OF FEDERAL SECTOR LABOR LAW

A. *Historical Development*

Federal workers have long valued collective bargaining rights, even though their rights have not been as extensive as those that private sector workers enjoyed. Federal workers received limited collective bargaining rights for the first time in 1962, when President John F. Kennedy signed Executive Order 10,988.¹⁹ This Order provided three forms of union recognition: "exclusive recognition" to a union chosen by a majority of workers in a bargaining unit, allowing it to "meet and confer" with management over policies affecting members of the bargaining unit; "formal recognition" with accompanying "consultation" rights to a union representing 10% of such workers; and "informal recognition" to a union representing any such workers, allowing the union to express its views on policies.²⁰ This order covered most federal workers, but excluded the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA).²¹ Presumably this was due to their central role in national security and the need for secrecy, but no explanation was given.²²

The rights were limited in that even exclusive representatives could only bargain over a relatively small range of topics. Notably, compensation and hours were not negotiable, as they were set by statute; and the order had a strong management rights clause.²³ Further, there was no mechanism to resolve bargaining impasses on subjects that were negotiable, and certainly no right to strike.²⁴ Management made all final decisions. Still, federal employees, desiring some voice in their working conditions, embraced their new rights.²⁵ Within two years, 730,000 federal workers were covered by collective bargaining agreements.²⁶

In 1969, President Richard Nixon issued Executive Order 11,491.²⁷ This Order eliminated forms of recognition other than exclusive

19. Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 17, 1962).

20. *Id.* (declaring the permissible functions of a union under each of the three forms of recognition); KEARNEY, *supra* note 16, at 49 (describing the three forms of recognition provided by Executive Order 10,988).

21. KEARNEY, *supra* note 16, at 49 (explaining which federal employees received coverage by Executive Order 10,988).

22. *Id.*

23. *See id.* at 50 (showing that the management rights clause in Executive Order 10,988 greatly restricted the scope of bargaining).

24. *See id.*

25. *See id.* at 49.

26. *Id.*

27. Exec. Order No. 11,491, 34 Fed. Reg. 17,605 (Oct. 29, 1969).

recognition.²⁸ It added a crucial feature for any bargaining law: management could no longer unilaterally dictate the outcome of bargaining impasses.²⁹ Instead, independent government agencies would resolve impasses; the Federal Mediation and Conciliation Service (FMCS) would mediate, and the Federal Services Impasse Panel (FSIP) was created to settle impasses by binding arbitration.³⁰

B. Current Federal Sector Bargaining Law

1. Limited Bargaining Rights, but Workers Still Organize

Today, the main federal sector labor law is the Federal Service Labor Management Relations Act (FSLMRA) of 1978.³¹ The FSLMRA sets out a full set of rules for federal labor relations. It created the Federal Labor Relations Authority (FLRA), a three-member panel that functions like the National Labor Relations Board (NLRB) by adjudicating representation and unfair labor practice cases.³² The FSLMRA gives covered workers the right to “engage in collective bargaining” with respect to “conditions of employment,” which are defined in part as “personnel policies, practices, and matters.”³³

The FSLMRA retained significant limits on union rights, restrictions that often were understated or ignored in the DHS debates. First, federal sector unions still cannot bargain over a number of subjects that private sector unions are allowed to negotiate. For example, wages, benefits, and hours of work are still set by statute and/or regulation and are not negotiable.³⁴ Nor can the parties negotiate for a union security clause,

28. See KEARNEY, *supra* note 16, at 51.

29. See *id.*

30. See *id.* (explaining the role of the Federal Mediation and Conciliation Service and the Federal Services Impasse Panel in resolving impasses).

31. Federal Service Labor-Management Relations Act, 5 U.S.C. §§ 7101-7135 (2000). The FSLMRA was part of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). The FSLMRA covers most, but not all, federal employees. The largest exclusion from the FSLMRA's coverage applies to employees of the U.S. Postal Service. Instead, the Postal Reorganization Act covers those employees. Postal Reorganization Act, 39 U.S.C. §§ 1001-1011 (1994). The Postal Reorganization Act also provides collective bargaining rights to these federal employees. See 39 U.S.C. §§ 1005, 1201-09 (1994) (providing postal service employees with the right to bargain collectively).

32. See § 7104; KEARNEY, *supra* note 16, at 53-54 (describing the FLRA). For example, the FLRA hears cases to decide which categories of employees may join a particular union bargaining unit and to determine whether the parties can negotiate over a particular bargaining proposal. See KEARNEY, *supra* note 16, 53-54.

33. See § 7102(2) (providing the right to engage in collective bargaining); § 7103(14) (defining the conditions of employment that can be subjects of bargaining).

34. See § 7103(14) (excluding matters set by federal law, such as compensation, from

which makes the FSLMRA a “right to work” law.³⁵ Also, the statute has a broad management rights clause. Section 7106(a)(2) of Title 5 limits negotiable subjects by stating that management has the authority:

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted; . . . [or]

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.³⁶

Indeed, of all labor laws, the FSLMRA contains some of the tightest restrictions on what is legally negotiable.³⁷ Federal sector unions are often reduced to bargaining over the “effects” or “impact” of management decisions, without any power to bargain over the decision itself.³⁸ One commentator concluded that this management rights clause “erected a barrier . . . to expanding the scope of bargaining” such that “federal management has generally retained its traditional rights more successfully than state and local managers”³⁹

Second, federal sector unions cannot legally strike in any circumstance.⁴⁰ Instead, bargaining impasses are referred first to the FMCS for mediation and then the FSIP for binding arbitration.⁴¹

Still, because the FSLMRA does allow workers a genuine voice

bargining); KEARNEY, *supra* note 16, at 193.

35. Thus, federal sector unions cannot negotiate clauses that require members of union bargaining units to pay any dues to the union obligated to represent them. *See* SEIU, AFL-CIO Local 556 and Dept. of Army, 1 F.L.R.A. 563, 564 (1979) (declaring that the agency shop proposal conflicts with § 7102 of FSLMRA); KEARNEY, *supra* note 16, at 53 (stating that federal employees cannot negotiate union security arrangements).

36. § 7106(a)(2).

37. *See, e.g.*, 5 C.F.R. §§ 610.101-610.408 (2003) (defining certain work schedules as nonnegotiable).

38. *See generally* PETER BROIDA, A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW AND PRACTICE (16th ed. 2003), chs. 4-6; *see also id.* at 1210-13 (describing “impact” bargaining rules on appraisals, breaks in work, parking, performance standards, and training).

39. KEARNEY, *supra* note 16, at 194.

40. *See* 5 U.S.C. § 7116(7) (2000) (making it an unfair labor practice for a union to participate in a strike, work stoppage or slowdown, to condone any such activity, or to fail to try to stop any such activity if such picketing interferes with an agency’s operations); 5 U.S.C. § 7311(3)-(4) (2000) (providing that an individual “may not accept or hold a position” in the federal government if he or she “participates in a strike or asserts the right to strike” against the government or “is a member of an organization of employees” that he or she knows asserts such a right).

41. *See* 5 U.S.C. § 7119 (2000) (setting rules for how bargaining impasses are handled).

through collective bargaining in a range of decisions that affect their working lives, federal employees continue to join unions in great numbers. In 2001, 42% of local government workers were in union bargaining units.⁴² Unions are able to negotiate, for example, about such topics as health and safety, training, antidiscrimination rules, and grievance/arbitration procedures for discipline.⁴³ Also significant for employees, in both bargaining impasses and arbitrations over contractual grievances, the FSLMRA provides for hearings by outside neutrals, instead of giving agency managers final authority.⁴⁴

2. Existing National Security Exemptions

Also relevant to the DHS debate, the FSLMRA excluded or permitted the exclusion of a few agencies and employees whose work was intimately related to national security. There are three sources of such exclusions: sections 7103(a)(3); 7103(b)(1); and 7112(b)(6). The legislative history does not explain the purpose or potential scope of these exclusions,⁴⁵ and at least until recently, all were used rarely and applied narrowly. For example, as Senator Dianne Feinstein (D-Cal.) noted during the DHS debates, "Department of Defense civilians with top secret clearances have long been union members."⁴⁶ Indeed, employees in all of the major agencies that became part of the DHS were covered by the FSLMRA.⁴⁷

42. *Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry*, Bureau of Labor Statistics, available at <http://www.bls.gov/news.release/union2.t03.htm> (last visited Feb. 1, 2004).

43. See BROIDA, *supra* note 38, at ch. 6 (providing a detailed discussion of what topics are and are not negotiable under the FSLMRA).

44. See § 7119(c) (detailing the role and the functions of the Federal Service Impasse Panel); 5 U.S.C. § 7121(b)(1)(C)(iii) (2000) (requiring binding arbitration when the parties do not settle their grievance under the negotiated grievance procedures); BROIDA, *supra* note 38 (discussing the processes for bargaining impasses and arbitrations over contractual grievances).

45. See, e.g., 124 CONG. REC. H13608 (daily ed. Oct. 14, 1978) (stating that the House intended to exclude from § 7112(b)(6) employees whose investigation work directly affected national security). The only discussion of § 7112(b)(6) is as follows:

[S]ection 7112(b)(6) excludes employees engaged in investigation or security work which directly affects national security. It is our intention that, in order for an employee to be excluded under subsection 7112(b)(6) because of investigation work, that work must directly affect national security. (If this had not been the case then the reference in subsection 7112(b)(7) to employees engaged in certain investigation functions would have been surplusage because these employees would already have been excluded by the preceding subsection).

Id.

46. 148 CONG. REC. S8888 (daily ed. Sept. 19, 2002).

47. Masters & Albright, *supra* note 3, at 70.

First, the FSLMRA specifically excludes certain agencies, including those dedicated to sensitive and secretive security matters. Section 7103(a)(3) of Title 5 excludes the FBI, CIA, National Security Agency, Secret Service, and Secret Service Uniformed Division.⁴⁸

Second, § 7103(b)(1) grants the President the power to exclude any agency or agency subdivision from coverage “if the President determines that (A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and (B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.”⁴⁹ This provision has been invoked fewer than a dozen times since its adoption in 1978 and usually in narrow areas like the Defense Intelligence Agency.⁵⁰ As discussed below, the Bush administration created a controversy by applying this exception to workers less obviously enmeshed in national security, employees of U.S. Attorneys’ offices around the country.

Third, § 7112(b)(6) allows agencies to exclude individual workers from union bargaining units on national security grounds. It provides that bargaining units under the FSLMRA cannot include “any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security.”⁵¹ The FSLMRA does not define “security work,” “directly affects,” or “national security.”⁵² In the first major case on this section, the FLRA defined “national security” to “include only those sensitive activities of the government that are directly related to the protection and preservation of the military, economic, and productive strength of the United States.”⁵³ The exclusion did not apply to work involving mere access to and use of sensitive information.⁵⁴ The FLRA added that this exclusion should be read narrowly because it deprived employees of unionization and bargaining rights, and Congress had determined that unions and collective bargaining in the federal sector are “in the public interest.”⁵⁵ In 1997, the FLRA slightly broadened the reach of § 7112(b)(6) by excluding certain employees in the Justice

48. 5 U.S.C. § 7103(a)(3) (2000). Other agencies (e.g., the Government Accounting Office, the Tennessee Valley Authority) were exempted for unrelated reasons. *See* 5 U.S.C. § 7103(a)(3)(A), (E) (2000) (providing that the General Accounting Office and the Tennessee Valley Authority were excluded from the definition of “agency”).

49. § 7103(b)(1).

50. *See* 148 CONG. REC. S9583-84 (daily ed. Sept. 30, 2002) (statement of Sen. Lieberman).

51. 5 U.S.C. § 7112(b)(6) (2000).

52. Dep’t of Energy, Oak Ridge Operations, Oak Ridge, Tenn., 4 F.L.R.A. 644, 655 (1980).

53. *Id.* at 655-56.

54. *Id.*

55. *Id.* at 655 (citing 5 U.S.C. § 7101(a) (2000)).

Department's Criminal Division and holding that this section can cover workers in civilian as well as military agencies.⁵⁶ Beyond this, prior to very recent events, § 7112(b)(6) was rarely used. Indeed, there was never any attempt to apply this exception to workers in the Customs Service, Border Patrol, Immigration and Naturalization Service (INS), or other agencies that would become part of the DHS.

C. *Creation of Federal Civil Service Rules*

Civil service protections are also at issue in the DHS and other agencies. Federal civil service rules originated in the Pendleton Act of 1883.⁵⁷ Passed in response to the assassination of President Garfield by a man allegedly disappointed after not receiving a patronage job, this Act attempted to decrease the role of political spoils and increase the importance of merit in federal employment.⁵⁸ It created civil service exams, barred dismissals of covered employees for political reasons, and created a bipartisan Civil Service Commission to enforce these rules.⁵⁹

The Civil Service Reform Act of 1978 sets the current civil service rules for federal employees. For example, 5 U.S.C. § 2301(b) requires that "selection and advancement" are to be determined "solely" on the basis of "relative ability, knowledge, and skills," and that "employees should be retained on the basis of the adequacy of their performance."⁶⁰ The purpose of the law is still to protect merit principles and to avoid patronage and cronyism.

Although some in the DHS debates advocated cuts in civil service protections, the current law has recently been criticized for being too weak as it stands. Richard Kearney cites abuses of the merit principle during the Reagan years,⁶¹ and the Heritage Foundation argues that the "Travelgate" controversy during the Clinton administration exemplified the "high spoils" system.⁶²

56. American Federation of State, County, and Municipal Employees Local 3719, AFL-CIO, 52 F.L.R.A. 1093 (1997).

57. Civil Service Act of 1883, ch. 27, 22 Stat. 403 (1883).

58. See MARGARET C. RUNG, *SERVANTS OF THE STATE: MANAGING DIVERSITY AND DEMOCRACY IN THE FEDERAL WORKFORCE*, 1933-53 23-24 (2002) (describing the political corruption that fueled the creation of the Pendleton Civil Service Act).

59. *Id.*; KEARNEY, *supra* note 16, at 178.

60. 5 U.S.C. § 2301(b) (2000).

61. See KEARNEY, *supra* note 16, at 180 (explaining how the merit system was undermined by abandoning written tests and relying too heavily on appointments).

62. See George Nesterchuk, Donald J. Devine & Robert E. Moffit, *Taking Charge of Federal Personnel*, THE HERITAGE FOUNDATION BACKGROUNDER No.1404, Jan. 10, 2001, at 5-6 (criticizing the Clinton approach to government management).

III. NEW RESTRICTIONS ON THE RIGHTS OF FEDERAL EMPLOYEES: THE AGENCIES SO FAR

The FSLMRA and Civil Service Act applied to the agencies that became part of the DHS. These statutes also applied or would have applied to all other agencies discussed herein. However, over the past two years the Bush administration has removed, proposed to remove, or given itself the option to remove rights under these laws from a large number of workers in agencies unrelated to the DHS. The scope and potential effect of these moves to eliminate bargaining rights can only be understood in this broad context. A chronology of the administration's actions follows.

A. *The DHS*

1. The Legislative Proposals

The DHS was the most highly publicized part of this story. The origin of this agency came on October 8, 2001, when President Bush issued an Executive Order creating the Office of Homeland Security within the White House.⁶³ Bush initially resisted the idea of a cabinet-level department, but after political pressure mounted (originally from Democrats), he endorsed the concept.⁶⁴ On June 18, 2002, he proposed creating a Department of Homeland Security that would include employees from the Customs Service, INS, Coast Guard, Federal Emergency Management Agency (FEMA), TSA, and Secret Service.⁶⁵

The creation of the DHS was then delayed for several months, almost entirely because of disagreements over the amount of authority the President and the newly-created position of Secretary of Homeland Security would have to waive civil service and collective bargaining rights for workers in the new agency.⁶⁶ Republicans argued for broader authority and Democrats resisted. This played out in competing proposals: a bill Senator Joseph Lieberman (D-Conn.) introduced in May 22, 2002, S. 2452; the Republican version, H.R. 5005, as amended and passed by the House in July 2002; and later a bipartisan compromise which the Senate rejected.⁶⁷

63. Masters & Albright, *supra* note 3, at 67.

64. *Id.* at 67-69.

65. *Id.* at 68-69. For a discussion of issues that predated the labor rights debate, including the question of whether a cabinet-level agency was appropriate, see Thomas Cmar, *Office of Homeland Security*, 39 HARV. J. ON LEGIS. 455 (2002).

66. See Masters & Albright, *supra* note 3, at 70, 75 (describing the repeated unsuccessful attempts to pass H.R. 5005 given the conflicting opinions of the degree of authority the executive would have to waive civil service and union rights).

67. *Id.* at 69-70.

Under the original version of the Republican bill, H.R. 5005, the Secretary of Homeland Security would establish a new personnel system and would have complete authority to remove bargaining and other worker rights.⁶⁸ Under H.R. 5005 as revised and passed by the House, the default would be that DHS workers would have FSLMRA rights, but the Secretary could exclude any part of the agency, including those in existing bargaining units, if the agency's mission and responsibilities materially changed and a majority of employees in the agency division had as their primary duty intelligence, counterintelligence, or investigative work directly related to terrorism.⁶⁹ Notably, the bill gave the President the ability to waive even these requirements if "the President determines in writing" that applying such requirements "would have a substantial adverse impact on the Department's ability to protect homeland security."⁷⁰

Under the Lieberman bill, union rights were presumptively conferred and the President could exclude certain units of the department only if he determined that the majority of employees in that unit primarily focused on intelligence, counterintelligence, or investigative work directly related to terrorism.⁷¹ Thus, FSLMRA protections applied unless the President made a specific determination that the majority of employees in the unit met the existing statutory requirements; he could not waive these requirements.⁷² Further, employees who were denied collective bargaining rights could appeal to the FLRA.⁷³

After those proposals led to a stalemate, Senators John Breaux (D-La.), Ben Nelson (D-Neb.), and Lincoln Chafee (R-R.I.) crafted a compromise that would have narrowed the conditions under which the President could remove the existing bargaining rights of employees from predecessor agencies. In their bill, no division of the DHS could lose such rights unless it was shown that the mission and responsibilities of the division had materially changed, and that a majority of the employees within the agency had as their primary duty intelligence, counterintelligence, or investigative work directly related to terrorism.⁷⁴ The compromise would also have allowed the President to rewrite civil service rules, but the new rules could have been challenged through binding arbitration by the FSIP.⁷⁵

68. *See id.* at 72 tbl. 3 (outlining aspects of each legislative proposal's provision on labor rights).

69. *See id.* (describing H.R. 5005 provisions concerning union rights and the authority of the Secretary of Homeland Security).

70. *Id.* at 75.

71. *Id.* at 72 tbl. 3.

72. *Id.* at 75.

73. 148 CONG. REC. S9584 (daily ed. Sept. 30, 2002) (statement of Sen. Lieberman).

74. *Id.*

75. *See* 148 CONG. REC. S9201 (daily ed. Sept. 25, 2002) (statement of Sen. Breaux)

The hostile reactions to this compromise demonstrated the administration's seriousness about eliminating rights that workers coming to the DHS had previously enjoyed. Then White House Press Secretary Ari Fleischer called the compromise a "non-starter."⁷⁶ Senator Trent Lott (R-Miss.) claimed that it was "an effort to try to find a way to make it difficult or even impossible for the President . . . to be able to do the job on homeland security."⁷⁷ Senator Lieberman replied that the bill would merely protect against "truly arbitrary use by some future President."⁷⁸ The President would retain his authority under existing law, but he would have to explain why the employees' mission had changed enough to justify a denial of bargaining rights, "when no previous President had said that doing the work of that agency was inconsistent with . . . union membership."⁷⁹ As to the provisions for independent arbitration by the FSIP over new rules, Senator Breaux added that the FSIP is not an "arm of the AFL-CIO," noting that the President appointed all of the FSIP's seven members.⁸⁰

President Bush was unconvinced. "[I]t's a bill which I will not saddle this administration and future administrations with allowing the United States Senate to micro-manage the process. The enemy is too quick for that."⁸¹ The impasse was finally broken by the November 2002 midterm elections, with Republicans winning a majority in the Senate. The Senate then passed a bill very similar to the amended version of H.R. 5005, and the President signed the bill into law on November 25, 2002.⁸²

2. The DHS Statute

Under the statute, the DHS was to fold in 170,000 employees from twenty-two predecessor agencies, over one-quarter of whom were covered

(explaining that the President would still have the power to remove collective bargaining rights for certain government employees under the proposed Breaux-Nelson-Chafee amendment); Derrick Cain, *Union Rights, Personnel Flexibility Gridlock Dims Hope Senate Will Pass Homeland Bill*, 40 Gov't Empl. Rel. Rep. (BNA) No. 1978, at 951 (Oct. 1, 2002) (stating that under the Breaux-Nelson-Chafee amendment, challenges could be made to new personnel rules through binding arbitration); see also 148 CONG. REC. S9200 (daily ed. Sept. 25, 2002) (offering Sen. Nelson's explanation of the bill).

76. Derrick Cain, *Union Rights, Personnel Flexibility Gridlock Dims Hope Senate Will Pass Homeland Bill*, 40 Gov't Empl. Rel. Rep. (BNA) No. 1978, at 951 (Oct. 1, 2002).

77. 148 CONG. REC. S9203 (daily ed. Sept. 25, 2002).

78. 148 CONG. REC. S9384 (daily ed. Sept. 26, 2002).

79. 148 CONG. REC. S9584 (daily ed. Sept. 30, 2002) (statement of Sen. Lieberman).

80. 148 CONG. REC. S9202 (daily ed. Sept. 25, 2002).

81. 148 CONG. REC. S9406 (daily ed. Sept. 26, 2002) (quoting a Sept. 21, 2002 radio address by the President).

82. Masters & Albright, *supra* note 3, at 70 fig. 2, 71; Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

by union contracts.⁸³ The largest of these agencies were the TSA, the INS, the Customs Service, the FEMA, the Coast Guard, and the Animal and Plant Inspection Service. For example, the DHS includes about 22,000 former Customs workers.⁸⁴ Most agencies were transferred to the DHS in March 2003 (for example, the INS became part of the DHS on March 1), and all transfers were to be complete by September 30.⁸⁵ By September, the DHS employed one of every twelve workers in the federal government.⁸⁶

The DHS staff also included workers from seventeen different unions that had negotiated seventy-seven collective bargaining agreements that covered around 48,000 workers.⁸⁷ For example, the INS had three bargaining units containing 24,324 employees; the Customs Service had two bargaining units with about 12,000 employees; the Coast Guard had forty-five bargaining units with 3,486 employees; and the Animal and Plant Health Inspection Service had seven bargaining units with 2,498 employees.⁸⁸

As to the power to design a personnel system waiving bargaining and civil service rights, the final statutory language has been labeled "an interesting compromise" that creates a presumption of continued bargaining and related rights, while also creating strong authority to revoke those rights.⁸⁹ Section 9701 of Title 5 empowers the Homeland Security Secretary to create, through joint regulations with the Director of the Office of Personnel Management (OPM), a new personnel system for the DHS. Such a system must conform with certain existing federal laws, such as antidiscrimination statutes, but it need not follow existing law in other

83. See *Federal Officials Consider Structural Issues in Building Homeland Security Department*, 40 Gov't Empl. Rel. Rep. (BNA) No. 1987, at 1160 (Dec. 3, 2002). The Act divides the DHS into four parts: information and infrastructure protection; border and transportation security; science and technology; and emergency response. Jonathan Thessin, *Department of Homeland Security*, 40 HARV. J. ON LEGIS. 513, 514 (2003) (offering a variety of criticisms of this structure).

84. See Stephen Barr, *Bush's Homeland Security Team Tries to Reassure, Rally the Troops*, WASH. POST, Nov. 21, 2002, at B2.

85. *Administration Anticipates Smooth Transition as INS Functions Move to Homeland Security*, 41 Gov't Empl. Rel. Rep. (BNA) No. 1999, at 225 (March 4, 2003). The DHS was to be fully operational by November 25, 2003. *Bush Signs Homeland Security Bill, Taps Ridge to Head New Department*, 40 Gov't Empl. Rel. Rep. (BNA) No. 1987, at 1159 (Dec. 3, 2002).

86. McFeathers, *supra* note 13.

87. 148 CONG. REC. S9375 (Sept. 26, 2002); Bureau of National Affairs, *Union Rights, Personnel Flexibility Gridlock Dims Hope Senate Will Pass Homeland Bill*, 41 Gov't Empl. Rel. Rep. (BNA) 951 (Oct. 1, 2002).

88. Masters & Albright, *supra* note 3, at 69 tbl. 1; *New Homeland Security Department Faces Challenges*, USA TODAY, Nov. 26, 2002, at A2.

89. Masters & Albright, *supra* note 3, at 80.

important areas, including FSLMRA rules on collective bargaining.⁹⁰ To create the new personnel system, the Homeland Security Secretary and the OPM Director were to draft rules, give existing unions thirty days to comment on them, notify Congress of any recommendations, “meet and confer” for at least thirty days with the unions, and possibly use FMCS to mediate if the Homeland Security Secretary or a majority of unions making recommendations so request.⁹¹ But the Homeland Security Secretary and the OPM Director are specifically authorized to implement their own proposals unilaterally after the thirty days “if the Secretary determines, in the Secretary’s sole and unreviewable discretion, that further consultation and mediation is unlikely to produce agreement.”⁹² The statute does not provide for any neutral authority with binding power.⁹³

As to the President’s power to eliminate bargaining rights, 6 U.S.C. § 412 contains a default rule that existing bargaining units will retain FSLMRA rights, but it also sets out the President’s authority to waive such rights using the language of H.R. 5005 as amended.⁹⁴ Currently, it appears

90. See 5 U.S.C.A. § 9701(b)-(c) (West Supp. 2003) (listing chapters of federal law that cannot be modified in a new personnel system; not listed are major provisions such as 5 U.S.C. ch. 43 (2000) (performance appraisals); ch. 51 (job classifications); ch. 53 (pay rates); ch. 71 (labor-management relations); ch. 75 (adverse actions); and ch. 77 (appeals)); see also AFGE, *Homeland Security: Questions & Answers*, available at <http://www.afge.org/Index.cfm?Page=QuestionsAnswers> (last visited Feb. 1, 2004) (elaborating on the six areas in which the system need not comply). The law is somewhat ambiguous as to the extent to which the Secretary of Homeland Security can waive bargaining rights through this new system. 5 U.S.C.A. § 9701(e) states that the new personnel system shall ensure a right to “bargain collectively” but the law does not require the new system to follow existing FSLMRA rules in ch. 71. One could imagine “bargaining rights” in which the impasse resolution procedure involved no neutrals, but was simply at the Homeland Security Secretary’s sole discretion. Also, the President still has the authority to exclude part or all of the agency from collective bargaining entirely.

91. 5 U.S.C. § 9701(e). In theory, the notification period would give lawmakers time to mobilize public pressure to objectionable provisions. See Christopher Lee & Stephen Barr, *New Agency, New Rules, and a Cost*, WASH. POST, Nov. 14, 2002, at A31.

92. U.S.C.A. § 9701(e)(1)(C)(ii).

93. There is some hortatory language in 6 U.S.C. § 411, which states that it is the “sense of Congress” that “it is extremely important” that DHS employees “be allowed to participate in a meaningful way in the creation of any human resources management system affecting them.” 6 U.S.C. § 411 (West Supp. 2003). This is because the employees “have the most direct knowledge of the demands of their jobs.” *Id.* Thus, a “collaborative effort will help secure our homeland.” *Id.* The Homeland Security Secretary, however, has the power to resolve unilaterally any disagreements that might arise during any collaboration. *Id.*

94. 6 U.S.C. § 412(a)-(b) (West Supp. 2003) states that the President can exclude workers from bargaining if the agency or agency subdivision’s responsibilities materially change and a majority of the employees within such unit have as their “primary duty intelligence, counterintelligence, or investigative work directly related to terrorism investigation.” But § 412(c) adds that the President can waive even these requirements (ten days after telling Congress why the waiver is needed) if he determines that these

that employees moved from other agencies that were covered by collective bargaining agreements will retain those agreements and bargaining rights for at least one year, but perhaps not beyond that.⁹⁵

Thus, the future of bargaining and civil service rights remains unclear. Paul Light concluded that Congress had “punted” by leaving the design of the system so open, noting that Secretary of Homeland Security Tom Ridge had a “very significant controversy on his hands.”⁹⁶ Proponents of bargaining rights have not given up. After the law was signed, Senator Lieberman said that if the President decided “to eliminate collective bargaining within a unit of the Department . . . I am confident the Congress will not just sit back and watch.”⁹⁷

There is hope for a more informed debate. In the spring of 2003, DHS leaders created a “design review team” to help create the new personnel system.⁹⁸ Three unions contributed team members: the National Treasury Employees Union (NTEU), the American Federation of Government Employees (AFGE), and the National Association of Agricultural Employees.⁹⁹ The sixty-person team promised to look at the best practices of both federal and state agencies.¹⁰⁰ In early October 2003, the team unveiled a list of fifty-two options for the DHS.¹⁰¹ As to labor relations, proposals varied considerably. They included expanding or narrowing negotiable topics, limiting the time for bargaining, allowing management to suspend bargaining rights for national security reasons, and removing the authority of the FSIP and FLRA altogether.¹⁰² The next step is for Secretary Ridge to issue proposals, triggering the thirty-day comment period and the thirty day “meet and confer” period (with possible

requirements “would have a substantial adverse impact on the ability of the Department to protect homeland security.” See Bureau of National Affairs, *Law Allows Personnel System Flexibility; Some Provisions Extended Governmentwide*, 40 Gov’t Empl. Rel. Rep. (BNA) No. 1987, at 1159 (Dec. 3, 2002).

95. Bureau of National Affairs, *DHS Team Will Look at Personnel Systems; Panel to Consider Recommendations This Fall*, 41 Gov’t Empl. Rel. Rep. (BNA) No. 2004, at 369-70 (Apr. 8, 2003); Tim Barker, *Push to Unionize Screeners Turns into a Political Battle*, ORLANDO (FLORIDA) SENTINEL, May 18, 2003, at H1.

96. Lee & Barr, *supra* note 91, at A31.

97. 148 CONG. REC. S11004 (2002).

98. Bureau of National Affairs, *SFLERP Speakers Offer Differing Views on Current State of Federal Labor Relations*, 41 Gov’t Empl. Rel. Rep. (BNA) No. 2011, at 564-65 (May 27, 2003).

99. *Id.*

100. Bureau of National Affairs, *DHS Team Will Look at Personnel Systems; Panel to Consider Recommendations This Fall*, 41 Gov’t Empl. Rel. Rep. (BNA) No. 2004, at 369 (Apr. 8, 2003).

101. Bureau of National Affairs, *Personnel System Design Team Issues Report; Wide Range of Possibilities Being Considered*, 41 Gov’t Empl. Rel. Rep. (BNA) No. 2028, at 995 (Oct. 7, 2003).

102. *Id.*

mediation).¹⁰³

B. Transportation Safety Administration: Collective Bargaining Already Eliminated

A few months after the DHS bill was signed into law, the administration again signaled its seriousness about this issue by banning collective bargaining at the TSA. The TSA was created on November 19, 2001 by the Aviation and Transportation Security Act.¹⁰⁴ There was a brief debate over whether the federal government should assume the traditionally private role of screening passengers and baggage at airports, but in the aftermath of 9/11 both political parties supported the federalization of these jobs.¹⁰⁵ The TSA soon hired nearly 56,000 screeners to work at more than 480 airports.¹⁰⁶ On March 1, 2003, the TSA was transferred into the DHS.¹⁰⁷

Prior to the transfer, James Loy, the head of the TSA, banned bargaining.¹⁰⁸ On January 8, 2003, he issued an Order stating that TSA employees, "in light of their critical national security responsibilities, shall not . . . be entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any representative or organization."¹⁰⁹ Loy explained, "Mandatory collective bargaining is not compatible with the flexibility required to wage the war on terrorism."¹¹⁰ He added, "Fighting terrorism demands a flexible workforce that can rapidly respond to threats. That can mean changes in work assignments and other conditions of employment that are not compatible with the duty to bargain with labor unions."¹¹¹ He also stated that the Order was a

103. AFGE, *Things Are Moving Along; The DHS Timeline for Developing a New Personnel System*, available at http://www.afge.org/Documents/DHS_Update_Flyer.pdf (last visited Feb. 1, 2004).

104. Aviation Security Act, Pub. L. No. 107-71, 115 Stat. 597, 49 U.S.C. § 44935, et seq. (2001).

105. Molly Selzer, Comment, *Federalization of Airport Security Workers: A Study of the Practical Impact of the Aviation and Transportation Security Act From a Labor Law Perspective*, 5 U. PA. J. LAB. & EMP. L. 363, 365-66 (2003).

106. Bureau of National Affairs, *AFGE Charters National Air Screener Local, Challenges Legality of TSA Bargaining Ban*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2000, at 253 (Mar. 11, 2003).

107. *Id.* at 254.

108. Loy had become the head of the TSA in July 2002. Selzer, *supra* note 105, at 368.

109. Memorandum from James M. Loy, Secretary of Transportation for Security, to the TSA Security Screeners (Jan. 8, 2003), available at <http://www.afge.org/Documents/LoyTSAMemo.pdf> (last visited Feb. 1, 2004).

110. Bureau of National Affairs, *TSA Order Bars Screeners From Bargaining; Union Files Suit, Will Continue Organizing*, 41 Gov't Empl. Rel. Rep. (BNA) No. 1992, at 27 (Jan. 14, 2003).

111. *Id.*

response to AFGE's organization of TSA employees.¹¹²

Loy's position came as a bit of a surprise. Prior to his Order, the *Wall Street Journal* had reported that experts thought it unlikely that he would prohibit bargaining in the TSA.¹¹³ Also, Paul Light had said that it was "hard to make the argument that these jobs are somehow so sensitive they should be exempt from bargaining."¹¹⁴

A debate ensued which, like the debates over the DHS that are discussed in greater detail below, questioned the utility of collective bargaining rights without reference to actual experiences with bargaining in any of a host of contexts. TSA official Nico Melendez simply asserted that "security is paramount and collective bargaining could cripple the system."¹¹⁵ Using unsupported and inaccurate stereotypes of inherent union inefficiency, Loy's spokesman Robert Johnson added, "When it comes to responding to new intelligence or terrorist threats on a moment's notice, we don't have time to check with a shop steward."¹¹⁶ TSA official Chris Rhatigan similarly claimed that "collective bargaining would be incompatible with the nation's safety."¹¹⁷ Union supporters were indignant. Sonny Hall, president of the AFL-CIO's Transportation Trades Department, insisted that Loy's position was "akin to saying that being a union member gives aid and comfort to the enemy."¹¹⁸ Absent from this debate were data from or comparisons to labor relations outside the federal government: for example, the fact that pilots, flight attendants, airline mechanics, and others in the airline industry all have the right to bargain collectively under the Railway Labor Act (RLA).¹¹⁹

112. *Id.* In November 2002, AFGE had filed petitions with the FLRA to represent TSA workers at Baltimore-Washington International and LaGuardia Airports. Bureau of National Affairs, *AFGE Charters National Air Screener Local, Challenges Legality of TSA Bargaining Ban*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2000, at 253 (Mar. 11, 2003); Complaint for Declaratory and Injunctive Relief at 4, *AFGE v. Loy*, available at <http://www.afge.org/Index.cfm?Fuse=Document&DocumentID=121> (last visited Feb. 1, 2004) (citing FLRA Case Nos. WA-RP-03-0023 and BN-RP-03-0008).

113. Stephen Power, *Union Makes Appeal to Airport Screeners*, WALL ST. J., Nov. 18, 2002, at A4.

114. *Id.*

115. David Bacon, *Screened Out: How 'Fighting Terrorism' Became a Bludgeon in Bush's Assault on Labor*, THE NATION, May 12, 2003, at 22.

116. Newswire Release, *Airport Screeners Forbidden From Unionizing*, TSA Chief Says, Associated Press (Jan. 10, 2003) (on file with author).

117. Bacon, *supra* note 115, at 22.

118. *Union Rights Stripped from Airport Screeners*, Says AFL-CIO, 840 Lab. L. Rep. 5 (CCH) No. 1302, at 5 (Jan. 22, 2003).

119. *Id.* Railway Labor Act, 45 U.S.C. §§ 151-63, 181-88, 44 Stat. 577 (1926). The RLA covers private sector airlines and provides full collective bargaining rights. 45 U.S.C. § 152 (2000).

C. Broadened Use of National Security Exclusions: The U.S. Attorney's Office, NIMA, and the Social Security Administration

Furthering the trend of restricting bargaining rights in the name of national security, the Bush administration has made broad use of the existing national security exemptions in the FSLMRA. First, on January 7, 2002, President Bush issued Executive Order 13252, pursuant to his authority under FSLMRA § 7103(b).¹²⁰ This Order excluded from collective bargaining employees in five sections of the Department of Justice, most significantly in U.S. Attorneys Offices (affecting around 1,000 workers) and the Criminal Division of the Justice Department.¹²¹

The administration has also taken a more aggressive approach with FSLMRA § 7112(b)(6), the provision allowing agencies to exclude individual workers from union bargaining units on national security grounds. In 2002, SSA officials argued that certain SSA employees should be excluded from a bargaining unit because their work “directly affects national security.”¹²² The jobs at issue—“electronics technician” and “physical security specialist”—did not even require a security clearance.¹²³ But the SSA insisted that this exemption applied, arguing that there would be a “significant effect on the national economy” if information in SSA facilities were to be lost.¹²⁴ For example, the agency maintained that if its computers were disrupted, “40 million people would be delayed in receiving their social security checks.”¹²⁵ Although the FLRA’s regional director had ruled that these employees should not be excluded under § 7112(b)(6), the FLRA, citing an “absence of precedent,” granted the agency’s application for a new hearing on the issue.¹²⁶

Then, in September 2003, the FLRA agreed with the SSA and

120. See Bacon, *supra* note 115, at 19.

121. See Bureau of National Affairs, *NIMA Director Excludes Employees From Bargaining Citing Security Concerns*, 41 Gov’t Empl. Rel. Rep. (BNA) No. 1996, at 148 (Feb. 11, 2003) (quoting Harnage’s statement that “the decision to exclude the NIMA employees from collective bargaining is consistent with the Bush administration’s anti-union history.”). The other sections excluded were INTERPOL-U.S. National Central Bureau, the National Drug Intelligence Center, and the Office of Intelligence Policy and Review. JOSEPH GRODIN ET AL., PUBLIC SECTOR EMPLOYMENT 13-14 (2003); Louis C. LaBrecque, *Locals Representing Workers at DOJ Agencies Dissolved by Bush Order*, Federal Unions Told, 40 Gov’t Empl. Rel. Rep. (BNA) No. 1943, at 59-60 (Jan. 15, 2002).

122. Soc. Sec. Admin., Balt., Md., 58 F.L.R.A. 170, 171 (2002).

123. *Id.* at 171.

124. *Id.*

125. *Id.* at 173.

126. *Id.* at 174.

reversed the decision of the regional director.¹²⁷ The regional director had noted that none of the individuals at issue were involved in the investigation of security clearances, none maintained classified materials, none communicated top secret information, and again, none of the jobs required a security clearance.¹²⁸ The FLRA held that the employees were excluded nonetheless. The “directly affects national security” test was met if the employees’ job tasks included: “(1) the designing, analyzing, or monitoring of security systems or procedures; or (2) the regular use of, or access to, classified information.”¹²⁹ The FLRA cited the Homeland Security Act’s finding that the government protects both classified and “sensitive but un-classified” materials,¹³⁰ and the FLRA determined that an employee could be covered by § 7112(b)(6) even if the employee’s job did not require a security clearance.¹³¹ It held for the first time that threats to “economic security” alone were covered by § 7112(b)(6).¹³² Under this standard, given that the workers at issue had some responsibility for designing or implementing security systems for SSA databases and facilities, they could be excluded from union bargaining units.¹³³

This case shows how far themes from the DHS debate can be pushed. The connections among (i) collective bargaining, (ii) the potential problem of social security checks, and (iii) a direct impact on national security seem tenuous at best. More generally, if these employees “directly affect” national security, then this exception could easily swallow the general rule allowing bargaining in the federal sector. If providing physical protection services to agencies whose disablement would have a substantial effect on the national economy constitutes work that “directly affects national security,” then it arguably follows that guards and other employees at practically every federal agency should be excluded from bargaining. Moreover, the SSA decision can be read as holding that employees can be excluded if they have responsibilities for a system that, were it to be shut down, could potentially have a disruptive effect on the economy. This interpretation could exclude a significant number of employees in practically every executive branch agency that deals with economic issues, including, for example, the Treasury, Commerce, and Agriculture Departments. Again, the FLRA originally held that the § 7112(b)(6) exclusion should be read narrowly because Congress had determined that collective bargaining in the federal sector is “in the public interest.”¹³⁴

127. Soc. Sec. Admin., Balt., Md., 59 F.L.R.A. 137 (2003).

128. *Id.* at 139 (citing the regional director’s decision).

129. *Id.* at 143 (citing United States Dep’t of Justice, 52 F.L.R.A. 1093, 1103 (1997)).

130. *Id.* at 144 (citing § 891 of the Homeland Security Act).

131. *Id.* at 145.

132. *Id.* at 145-46.

133. *Id.* at 146.

134. Dep’t of Energy, Oak Ridge Operations, Oak Ridge, Tenn., 4 F.L.R.A. 644, 655,

Going even further than the majority, the concurring opinion of FLRA Chairman Cabaniss held that if a federal agency simply designates a position as “sensitive” in the national security sense, the FLRA would have no power to review that designation.¹³⁵ For example, the union could not try to show that an employee’s duties did not actually implicate national security. Such an approach, if adopted, would be entirely inconsistent with modern law, which mandates that the FLRA look at the actual duties of a job.¹³⁶ But it would be consistent with a disastrous series of cases from an earlier era of public sector labor law, discussed in section IV.A. below. These cases effectively gave the direct employer of labor the power to decide whether its employees would have bargaining rights.

Further, on January 28, 2003, James Clapper, Director of the National Imagery and Mapping Agency (NIMA) announced that NIMA employees would no longer have collective bargaining rights due to national security concerns.¹³⁷ Clapper’s memo also voided existing collective bargaining agreements among NIMA and two AFGE locals representing more than 1,000 employees.¹³⁸ Among the employees affected were cartographers, digital imaging specialists, data management specialists, and security guards.¹³⁹

This move was also controversial. The legislation establishing NIMA in 1996 allowed continuation of collective bargaining as long as the duties of the workers did not change to include certain national security tasks.¹⁴⁰ But Edward Obloy, NIMA’s general counsel, said that grandfathering in bargaining rights was a “one-time solution” and that the September 11 attacks made it necessary to reclassify NIMA jobs to involve intelligence

(1980) (citing 5 U.S.C. § 7101(a)).

135. Soc. Sec. Admin., Balt., Md., 59 F.L.R.A. at 147.

136. BROIDA, *supra* note 38, at 7-8.

137. Louis C. LaBrecque, *NIMA Director Excludes Employees From Bargaining, Citing Security Concerns*, 41 Gov’t Empl. Rel. Rep. (BNA) No. 1996, at 148 (Feb. 11, 2003).

138. *Id.*

139. *Id.*; Letter from Bobby L. Harnage, Sr., National President, AFGE, to the Honorable Arlen Specter (R-Pa.) (Feb. 21, 2003), http://www.afge.org/Index.cfm?Page=AirportScreeners&File=2003_02_21_letter.htm (last visited Feb. 1, 2004).

140. National Imagery and Mapping Agency Act, 10 U.S.C. § 461(c) (1996). 10 U.S.C. § 461(b) provides that NIMA would recognize unions under the FSLMRA if they existed in the predecessor Defense Mapping Agency. But § 461(c) adds:

[if NIMA’s Director] determines that the responsibilities of a position within a collective bargaining unit should be modified to include intelligence, counterintelligence, investigative, or security duties not previously assigned to that position and that the performance of the newly assigned duties directly affects the national security of the United States, then, upon such a modification of the responsibilities of that position, the position shall cease to be covered by the collective bargaining unit [and the employee can no longer be represented by a union with FSLMRA rights].

duties that would disqualify workers from bargaining rights.¹⁴¹ Bobby Harnage, then the president of AFGE, responded by stating that NIMA workers were “performing the same jobs they have performed for years,” and that the agency’s mission “has not changed.”¹⁴²

1. The Future? Department of Defense Proposals

The trend described above became even broader with new proposals for workers in the DOD. On May 22, 2003, the House passed H.R. 1588, which would have allowed the Secretary of Defense to create a new personnel system for the DOD, again gutting established employment rules.¹⁴³ The bill would have barred local union bargaining on issues of department-wide interest and require national-level bargaining instead.¹⁴⁴ More importantly, the bill would have eliminated the role of the independent FSIP in resolving bargaining impasses.¹⁴⁵ Instead, when an impasse occurred, the Secretary of Defense could simply impose his or her own decision (after Congressional notification).¹⁴⁶ On November 24, 2004, President Bush signed legislation authorizing the DOD to create its own personnel system. Similar to the process at the DHS, the new DOD system will be created through regulations issued jointly by the Secretary of Defense and the Director of the OPM. Among other things, the new law will allow the DOD to bargain at a national level with unions, rather than local unions; to replace Merit Systems Protection Board hearings with an internal process (with eventual appeal rights to the full Board); and, most ambiguously and potentially problematic, to replace the FLRA with another third-party to review labor disputes.¹⁴⁷

These provisions could be even more significant than the DHS law.

141. Louis C. LaBrecque, *NIMA Director Excludes Employees From Bargaining, Citing Security Concerns*, 41 Gov't Empl. Rel. Rep. (BNA) No. 1996, at 148 (Feb. 11, 2003).

142. *Id.*; Harnage to Specter, *supra* note 139.

143. H.R. 1588, 108th Cong. § 9902 (2003); *DOD Proposes 'Transformation' Bill; Workforce Management Changes Sought*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2006, at 421 (April 22, 2003); Julie Hirschfeld Davis, *Rumsfeld Labor Proposal Draws Fire*, *BALT. SUN*, May 21, 2003, at 3A.

144. Louis C. LaBrecque, *DOD Changes Included in House-Passed Bill, But Not Senate's Version; Conference is Next*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2011, at 545 (May 27, 2003); Louis C. LaBrecque, *DOD Personnel Reform Bill Clears Committee On Party-Line Vote; Would Affect NASA, SEC*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2009, at 499, 500-01 (May 13, 2003).

145. Louis C. LaBrecque, *DOD Personnel Reform Bill Clears Committee On Party-Line Vote; Would Affect NASA, SEC*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2009, at 499, 500-01 (May 13, 2003).

146. *Id.* at 500.

147. President Signs DOD Authorization Law Allowing Creation of New Personnel System, 41 Gov't Empl. Rel. Rep. (BNA) No. 2036, at 1185 (Dec. 12, 2003).

The DOD, with roughly 700,000 employees, is the second-largest federal employer of civilian workers in the nation, after the Postal Service.¹⁴⁸ Given its size, changes to the DOD's personnel system would almost surely affect other federal employees, and quite possibly affect workers outside the federal government. "We're concerned about the 'domino effect,'" said Jeff Friday, counsel for NTEU.¹⁴⁹

Debates on this proposal have followed a now-familiar pattern. The proposed change, said Secretary of Defense Donald Rumsfeld, is "nothing less than a national security requirement."¹⁵⁰ Opponents claim the plan strips workers of key rights and would allow politics to creep into personnel decisions.¹⁵¹

Thus, attempts to restrict worker rights have spread throughout the federal government and have become one of the central labor-management issues of the day. Still, the arguments on both sides of the debate have lacked context and history. As one article on the DHS put it, the "crux of the controversy boiled down to one question: is unionism compatible with homeland security? The answer depended largely on the pre-existing view one had of what unions do."¹⁵² Unfortunately, the debates have ignored the rich and instructive history of labor relations in this country, a history that can help resolve the debate.

IV. FOUR MISTAKES FROM PUBLIC SECTOR LABOR HISTORY THAT SHOULD NOT BE REPEATED

A. *Allowing the Employer to Make the Law*

One of the central features of the new and proposed personnel systems discussed above is that they all allow agency officials—the direct employers of labor—not just to set workplace policies, but also to create the legal rules that govern whether those policies are valid and how they may be modified or challenged. In all these schemes, the employer can remove substantive rights, such as the right to bargain collectively. The employer can also remove crucial procedural rights like the right to have bargaining impasses or grievances heard by neutral third parties. Before

148. Davis, *supra* note 143.

149. Louis C. LaBrecque, *SFLERP Speakers Offer Differing Views on Current State of Federal Labor Relations*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2011, at 565 (May 27, 2003).

150. Davis, *supra* note 143.

151. For example, Rep. Chris Van Hollen (D-Md.) said, "We want to make sure that employees are rewarded and treated based on merit, not on their political loyalties and political favoritism." *Id.*

152. Masters & Albright, *supra* note 3, at 75.

the 1960s, nearly all of the public sector effectively operated in this fashion, leading predictably to an extraordinarily restrictive legal regime.¹⁵³ Decades after the NLRA gave private sector workers the rights to organize, bargain, and strike, public workers remained unable to strike or bargain, and they lacked even the basic right to organize.¹⁵⁴ Beginning in the 1960s, however, policymakers at all levels began rejecting this older model both out of concern for workers' rights and a desire for better-functioning public agencies.¹⁵⁵

1. Deference, Democracy, and Employers Making the Law in History

Through the 1960s, employers had the effective power to create legal rules for their employees due to court doctrines of deference and delegation, and due to the policy concern that public officials should set terms of employment without influence from unions, arbitrators, or even courts.¹⁵⁶ Courts held that legislatures had delegated power over public employment to local officials, and therefore judges should defer to the decisions of those officials regarding unions.¹⁵⁷ For example, in 1935 the Virginia Supreme Court held that a local public employer had enough power to classify union membership as "cause" for discharge under a civil service statute that required "cause" for removal.¹⁵⁸

This degree of judicial deference meant that the employers' own policies became the effective "law" of labor relations in local government agencies. Not surprisingly, local officials often simply barred their workers from organizing unions.¹⁵⁹ For example, in 1917 the Illinois Supreme Court upheld the Chicago Board of Education's ban on a teachers' union, stating that the court would defer to the board in all aspects of hiring.¹⁶⁰

153. Slater, *supra* note 10, at 981-82.

154. *Id.*

155. SLATER, *supra* note 14, at 158-203.

156. *Id.* at 71-96, 158-92.

157. Courts had a great deal of power in public sector labor cases in this era, because until 1959, no state had passed a general public sector labor statute. *Id.* at 71-96, 158-92.

158. *Carter v. Thompson*, 164 Va. 312, 316 (1935). A related legal objection to union rights in this era was that bargaining or arbitration would violate constitutional nondelegation doctrines by shifting public power to private hands, such as a union, and/or an arbitrator. *See, e.g., Mugford v. Mayor of Baltimore*, 185 Md. 266, 270 (1945) (striking down an agreement between the city and the union recognizing the union as the collective bargaining agent of its members). This concern has been rejected by the overwhelming majority of jurisdictions in the past forty years, although a few still cling to it. Karen M. Speiser, Note, *Labor Arbitration in Public Agencies: An Unconstitutional Delegation of Power or the "Waking of a Sleeping Giant?"*, 1993 J. DISP. RESOL. 333, 340-42 (1993).

159. *See* Slater, *supra* note 10, at 990-1000.

160. *People ex rel. Fursman v. City of Chicago*, 116 N.E. 158, 160 (Ill. 1917).

Similarly, fire departments banned the firefighters' union¹⁶¹ and police departments banned police unions.¹⁶² This policy finally began to change in the 1960s, when policymakers began to realize, among other things, that the employer was not in the best position to judge what rights its employees should have vis-à-vis the employer.¹⁶³

A related concern was that as a matter of policy (rather than law) bargaining eroded democratic control of public agencies. As summarized by Clyde Summers, the traditional argument is that in the public sector "the collective agreement is not a private decision, but a governmental decision."¹⁶⁴ For example, as labor costs are often a major part of a city's budget, bargaining over compensation implicates levels of taxes and services.¹⁶⁵ Similarly, "holidays close city services for the day," and "[o]ther contractual provisions may affect the kind or quality of public services provided."¹⁶⁶ Thus bargaining "shapes policy choices which rightfully belong to the voters to be made through the political processes."¹⁶⁷

Some comments during the DHS debates echoed this point. Senator Fred Thompson (R-Tenn.) paraphrased part of a Franklin Roosevelt quote: "All government employees should realize that the process of collective bargaining has its distinct and insurmountable limitations" in the public sector "because the obligation to serve the whole people is paramount."¹⁶⁸ This objection ignores how public sector bargaining laws have addressed concerns about public control of public services.

2. How Public Sector Law Addressed These Concerns: Limits on Bargaining Topics

In recent decades, concerns about control of government services mainly have been addressed by limiting the topics that public sector unions can negotiate. The idea that the government simply could not bargain with unions was increasingly rejected. As early as the 1930s, William Leiserson (a member of the NLRB) wrote that public sector unions should be able to

161. See, e.g., *CIO v. City of Dallas*, 198 S.W.2d 143, 149 (Tex. Civ. App. 1946) (preventing the fire department from unionizing).

162. See, e.g., *City of Jackson v. McLeod*, 24 So. 2d 319, 322 (Miss. 1946) (dismissing a member of the police force for union activities); see also *City of Cleveland v. Div. 268 of Amalgamated Ass'n of St. & Elec. Ry. & Motor Coach Employees*, 90 N.E.2d 711, 716 (Ohio C.P. 1949) (barring a union of public transportation employees).

163. SLATER, *supra* note 14, at ch. 6, conclusion.

164. Clyde Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. TOL. L. REV. 265, 266 (1987).

165. *Id.*

166. *Id.*

167. *Id.*

168. 148 CONG. REC. S9571 (daily ed. Sept. 30, 2002).

contract with employers in areas where legislation did not set the term of employment.¹⁶⁹ "Within the limits of our authority we have got to bargain," he insisted.¹⁷⁰ "We must not hide behind the Government and say the Government can't bargain."¹⁷¹ In 1955 the American Bar Association declared that statutory bars on public workers organizing and bargaining were "not satisfactory approaches."¹⁷² Private sector rights, "modified to meet the unique needs of the public service," should be granted to government employees.¹⁷³ In 1959, the ACLU called for bargaining rights for public workers.¹⁷⁴ This was partly a reaction to actual, informal negotiations already taking place in the public sector.¹⁷⁵ In 1957, Edward Cling argued that the "great deal of informal collective bargaining" actually occurring in government employment meant that "legalistic" and other objections to public sector bargaining "must be reviewed from a practical standpoint."¹⁷⁶

Thus began serious explorations of how labor law could be adjusted to fit the public sector. Today, the majority of states address concerns about democratic control by limiting the issues that can be subjects of collective bargaining. For example, as shown above federal sector unions under the FSLMRA generally cannot negotiate pay rates because they are set by statute.¹⁷⁷ Typically under state law, staffing levels and issues involving the budget and mission of a public agency are nonnegotiable, as are certain matters covered by civil service rules such as merit examinations.¹⁷⁸ Certain professions can have additional, specific restrictions; in public schools, for example, class size, the length and beginning of the school year, and curricular issues are generally nonnegotiable.¹⁷⁹ Jurisdictions vary as to what issues are negotiable, and thus offer real world data for comparison and study as to which issues are best left to legislatures, agency managers, or collective bargaining.¹⁸⁰

169. RUNG, *supra* note 58, at 126.

170. *Id.*

171. *Id.*

172. *Report of the Committee on Labor Relations of Governmental Employees*, 1955 A.B.A. SEC. LAB. REL. L. PROC. 89, 89.

173. *Id.*

174. SLATER, *supra* note 14, at 161.

175. *Id.* at chs. 5 & 6.

176. *Id.* at 164. See *infra* Section IV.D.1. for more on "informal" bargaining.

177. See *infra* Section II.B.1.

178. For example, jurisdictions are split as to whether drug testing is a mandatory subject of bargaining in certain public sector jobs. HARRY T. EDWARDS ET AL., *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 383-90 (4th ed. 1991). To cite another model, Nevada limits public sector bargaining to twenty specified items. NEV. REV. STAT. ANN. § 288.1500 (Michie 2002).

179. KEARNEY, *supra* note 16, at 202-03.

180. See generally EDWARDS, *supra* note 178, at 358-469 (collecting cases and statutes).

The solution of allowing bargaining on limited topics also responds to concerns about democracy by recognizing that elected officials are not involved in the day-to-day process of labor relations. As Senator Barbara Boxer (D-Cal.) asked during the DHS debates, "Doesn't the President have more things to occupy himself . . . than worrying about whether a secretary or a file clerk" can bargain collectively over routine work rules?¹⁸¹ More broadly, decades of experience in all levels of government have shown that it is possible to bargain successfully over a range of topics more limited than those bargained over in the private sector without inhibiting democratic control of government.

B. Misguided Strike Fears and Misunderstanding Alternatives for Resolving Bargaining Impasses

1. Impasse Resolution Issues in the Current Debates

During the DHS debates, Senator Boxer pointed out that "[f]ederal employees cannot strike, nor should they. That is not an issue."¹⁸² None of the unions or workers in any of the agencies discussed in this article have gone on strike. Still, the alarming prospect of a strike appeared in recent rhetoric. Regarding President Bush's order excluding certain Department of Justice employees from bargaining, White House Press Secretary Ari Fleischer stated that "[t]here is a long tradition the presidents of both parties have honored about protecting the public by not allowing certain law enforcement or intelligence officials to strike."¹⁸³ This statement contains the classic mistake, all too common in the first half of the twentieth century, of conflating bargaining and the right to strike.

Others confused strikes and bargaining as well. Praising the TSA's denial of bargaining rights, Charles Slepian of the Foreseeable Risk Analysis Center stated that even if screeners could not legally strike, union workers could use related tactics such as sick-outs and work slowdowns to apply pressure during contract negotiations.¹⁸⁴ "We can't start messing around with the aviation industry," he added.¹⁸⁵ Slepian did not cite any examples of screeners or related workers using or threatening such tactics, nor did he comment on the fact that private sector workers in the aviation

181. 148 CONG. REC. S9058 (daily ed. Sept. 24, 2002).

182. 148 CONG. REC. S8072 (daily ed. Sept. 3, 2002). Senator Lieberman (D-Conn.) echoed this statement. 148 CONG. REC. S9583 (daily ed. Sept. 30, 2002).

183. GRODIN, *supra* note 121, at 20; *Bush Bars Some U.S. Officials From Going on Strike*, REUTERS, Jan. 7, 2002.

184. Barker, *supra* note 95, at H1.

185. *Id.*

industry (including pilots, flight attendants, and mechanics) can all bargain collectively under the RLA.¹⁸⁶

Beyond the specter of strikes, opponents of bargaining implied that a binding impasse resolution procedure that uses neutral arbiters is inherently problematic, either because it might prevent the employer from doing what it wants or because the process could take some time. Senator Phil Gramm (R-Tex.) seemed to object in principle to the idea that a union could ever win an issue through third-party resolution.¹⁸⁷ He recalled an effort "in 1987, to change the makeup of our inspection center in the Customs office at Logan Airport."¹⁸⁸ The union appealed to the FLRA "and the power of the Administration to change the configuration of the inspection room was rejected."¹⁸⁹ This statement was apparently a reference to *U.S. Customs Service and National Treasury Employees Union*,¹⁹⁰ in which the FLRA held that the employer improperly renovated the room because it did so without providing the union with notice and an opportunity to bargain over the effects of the change.¹⁹¹ Gramm's statement goes to the very idea that a neutral body could tell an agency that the agency could not do exactly what it wanted to do, rather than demonstrate that any particular decision of such a neutral body has hurt security or efficiency.

Senator Thompson was concerned about the time impasse resolution can take.

If the union refuses to enter into a negotiated agreement with you, you have to go to the Federal Services Impasses Panel.

I don't think . . . the Federal Services Impasses Panel—whatever that is—is going to come up with terrible decisions; it is, again, do we really need to go through this kind of process . . . ?¹⁹²

He added, "I cannot stand here and tell you how long it would take . . . but I can assure you it would be longer than it should."¹⁹³ Thompson derided disputes "that go on for months and sometimes years over such issues as whether or not the annual picnic was rightly called off."¹⁹⁴ "The administrative process is rife with cases such as disputes over whether or not the smoking area should be lit. Sometimes it takes years in order to resolve issues that way."¹⁹⁵

186. *Id.*

187. 148 CONG. REC. S8710 (daily ed. Sept. 18, 2002).

188. *Id.*

189. *Id.*

190. 29 F.L.R.A. No. 65 891 (1987).

191. *Id.* at 891.

192. 148 CONG. REC. S9571 (daily ed. Sept. 30, 2002).

193. *Id.*

194. 148 CONG. REC. S9568 (daily ed. Sept. 30, 2002).

195. *Id.*

Again, neither these examples nor data from the decades of experience with various forms of impasse resolution in the public sector show that binding impasse procedures using neutral arbiters prevent agencies from taking actions important to public safety. In the federal sector, the strong management rights clause limiting what unions can bargain to impasse makes this even less of a concern. Indeed, it is revealing that Thompson cited cases involving picnics and lighting as opposed to staffing, for example, which is not negotiable. Even assuming delays in resolving lighting issues, would that threaten security? Federal employees cannot strike at impasse, and other aspects of agency work are not halted while the FSIP and FMCS consider particular issues at impasse.¹⁹⁶ On the other hand, the right to have a voice through collective bargaining in day-to-day labor relations matters is important to federal workers, as witnessed by the fact that 42% of them belong to union bargaining units.¹⁹⁷ As will be shown in more detail below, considerable evidence suggests that this voice also increases employer efficiency.

2. Overcoming the Strike Fear and the Development of Alternative Impasse Resolution Procedures

Here too, modern debates ignored historical lessons. Over the course of the twentieth century the assumption that public sector bargaining would lead to strikes was eventually addressed by laws providing a variety of alternate methods of resolving bargaining impasses. Up until the 1960s, judges denied public workers the right to bargain and even organize partly because judges feared that these workers would strike.¹⁹⁸ In 1943 a New York state court, in a case that did not present any strike issues, proclaimed that strikes against the government represented “rebellion against constituted authority.”¹⁹⁹ As late as 1962, a South Dakota court upholding a bar on public workers organizing, referred to the threat of strikes, even

196. See BROIDA, *supra* note 38, at chs. 4-6.

197. *Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry*, Bureau of Labor Statistics, available at <http://www.bls.gov/news.release/union2.t03.htm> (last visited Feb. 1, 2004).

198. See Slater, *supra* note 10, at 1016-17 (discussing the impact of the Boston police strike on later unionization efforts).

199. *Railway Mail Ass'n v. Murphy*, 180 Misc. 868, 44 N.Y.S.2d 601, 607-08 (1943), *rev'd on other grounds sub nom. Railway Mail Ass'n v. Corsi*, 267 App. Div. 470 (1944), *aff'd*, 56 N.E.2d 721 (Ct. App. 1944), *aff'd*, 326 U.S. 88 (1945). Other courts echoed the “rebellion against constituted authority” line, again in cases that did not involve any strike issues, e.g., *City of Los Angeles v. Los Angeles Bldg. and Trades Council*, 94 Cal.App.2d 36, 48 (1949). See also *City of Cleveland v. Div. 268*, 90 N.E.2d 711, 715 (Ohio Ct. App. 1948) (“The right to strike, if accorded to public employees, I say, is one means of destroying government. And if they destroy government, we have anarchy, we have chaos.”).

though the facts of the case raised no issue regarding strikes or a claimed right to strike.²⁰⁰

The belief that public sector unions necessarily would strike was based on a lack of experience with alternate impasse resolution methods. Judges quoted Franklin Roosevelt, stating that "collective bargaining as usually understood cannot be transplanted into the public service" partly because strikes "could never be allowed."²⁰¹ These judges ignored the subtlety of Roosevelt's caveat "as usually understood."²⁰² For example, Roosevelt supported laws allowing limited bargaining in some New Deal agencies, notably the Tennessee Valley Authority; strikes were barred, but the parties used other methods to resolve impasses.²⁰³ The fears were also not based in actual experience. Starting in 1919 and continuing through the early 1960s, both AFL and CIO public sector unions renounced the strike weapon, and public sector strikes were rare, short, and small.²⁰⁴

By the 1950s mainstream voices began pondering alternatives for impasse resolution. The *Providence Evening Bulletin* editorialized that a fear of strikes "lies at the root of all suspicion of public unions," but it added that in exchange for a ban on strikes, unions should have mediation and binding arbitration to settle bargaining impasses.²⁰⁵ Anticipating later empirical findings, Professor Roland Posey wrote that the danger of public sector strikes came from refusing to recognize unions, not from allowing bargaining.²⁰⁶ Arvid Anderson, a prominent labor-relations professional in Wisconsin, agreed: "[A]bsent adequate grievance and collective bargaining procedures, public employee disputes will increase in number and seriousness."²⁰⁷ Anderson also argued that in lieu of strikes, public sector

200. *Levasseur v. Wheeldon*, 112 N.W.2d 894 (S.D. 1962).

201. *CIO v. Dallas*, 198 S.W.2d 143, 144-45 (Tex. Ct. App. 1946).

202. *Id.*

203. The TVA began bargaining with unions in 1936. In 1940, Roosevelt praised a "splendid new agreement" produced by bargaining, adding that "collective bargaining and efficiency have proceeded hand in hand." STERLING D. SPERO, *GOVERNMENT AS EMPLOYER* 346 (1948). These rights were, of course, limited. As to wages, the parties were bound by prevailing rates; negotiations merely determined what that rate was. *Id.* at 438-40; MURRAY NESBITT, *LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE* 99 (1976).

204. This was partly a reaction to the infamous Boston police strike of 1919. *See* SLATER, *supra* note 14, at 13-39. Some public workers did strike during the strike wave of 1946, but such actions were relatively minimal. In 1946—the height of public sector strikes until the late 1960s—there were forty-three strikes of municipal workers. But these were mostly one day actions, and the time lost in this exceptional year was only 0.034% of total municipal working time. In that same year, private sector strikes cost 1.5% of total working time. *Id.* at 82.

205. SLATER, *supra* note 14, at 164.

206. *Id.*

207. Arvid Anderson, *Labor Relations in the Public Service*, 1961 WIS. L. REV. 601, 633.

unions should be able to use mediation, fact-finding, and arbitration.²⁰⁸

In the 1960s, states began passing laws that allowed public sector bargaining and created alternative impasse resolution mechanisms. The first such law was passed in Wisconsin in 1959 and strengthened in 1962 and thereafter.²⁰⁹ After the 1962 revisions, the law provided that at impasse, a state agency could conduct mediations at the request of both parties and fact-finding at the request of either party.²¹⁰ Later, the law was amended to provide for binding arbitration.²¹¹ This trend caught on quickly thereafter. By 1966, sixteen states had enacted laws extending some bargaining rights to at least some public workers.²¹² Today, while only twelve states allow any government employees to strike, thirty-eight states provide some impasse procedures for at least some unionized public workers.²¹³ This has led to diverse practices: thirty-six states use mandatory or optional mediation; thirty-four use fact-finding; and thirty have arbitration as the final step, with twenty-one using binding arbitration.²¹⁴

Thus, while variations abound, the federal government and two-thirds of the states have adopted public sector impasse procedures that do not end—as recent proposals for federal workers discussed above do—with management officials making the final decision (twelve states allow strikes and twenty-one states use binding arbitration).²¹⁵ Notably, proponents of limiting the rights of federal workers have not cited any data or examples from binding arbitration jurisdictions showing that binding arbitration interferes with public safety or agency efficiency.

Equally intriguing for the DHS and related debates, research indicates that public sector laws providing for arbitration to resolve impasses are

208. *Id.* at 629-33.

209. Chap. 509 of Wisconsin Laws of 1959, Wisc. Stat. Ch. III, subchapter IV. For a description of the long fight to pass this law, see SLATER, *supra* note 14, at ch. 6.

210. Chap. 663 of the Laws of 1961, amending Wisc. Stat. ch. III, subchapter IV.

211. See Najita & Stern, *supra* note 17, at 71.

212. SLATER, *supra* note 14, at 191.

213. KEARNEY, *supra* note 16, at 236-38 tbl. 8.2, 262, 264-65 tbl. 9.1 (listing state strike rules and bargaining impasse rules).

214. *Id.* at 262; GAO, *Number of Workers with and Without Bargaining Rights*, *supra* note 8, at 10 n.18.

215. There are differences within these broad categories as well. In some states, both parties must request mediation; in others, the state agency may intervene on its own. KEARNEY, *supra* note 18, at 263. Within the universe of arbitration, about fifteen states require “final offer” arbitration for at least some workers (meaning that the arbitrator must choose one party’s final offer); other states allow arbitrators to make compromises. *Id.* at 264-65 tbl. 9.1, 274. In “final offer” arbitration, some systems require the arbitrator to select one set of proposals as a whole; others allow the arbitrator to choose one party’s language on some issues and the other party’s language on others. *Id.* at 274. Statutes also differ in the criteria they require arbitrators to consider in their impasse decisions. *Id.* at 275-77.

more successful in preventing strikes than are statutory bars on strikes alone.²¹⁶ Indeed, in the past two decades, although public sector bargaining has been quite common, public sector strikes have been relatively rare. For the sixteen-year period from 1982 to 1997, there were no strikes by federal employees, twenty-three strikes by state employees (no more than five in any one year), and ninety-three strikes by local government employees (no more than ten in any one year).²¹⁷ Federal workers in PATCO did strike in 1981, but this event seems like the proverbial exception that proves the rule.²¹⁸ If anything, the disastrous PATCO strike may have ensured that other federal employees would not strike in the future.²¹⁹

C. *Inaccurate Stereotypes of Union Workers: Divided Loyalty and Inefficiency*

Advocates of eliminating worker rights have echoed outdated, inaccurate stereotypes of unions as inherently inefficient without supporting evidence. Thus, they set public safety in opposition to worker rights, often dramatically. Senator Gramm insisted that “[w]hen workers’ rights interfere with people’s right to their life and their freedom, . . . there has to be some flexibility.”²²⁰ He asked rhetorically whether preserving a system “that was designed primarily to protect workers . . . [is] more important than enhancing the probability that we can protect lives?”²²¹ Even Democratic Senator Zell Miller (D-Ga.) predicted, “They will ask: Why did they put workers’ rights above Americans’ lives?”²²² Long-established standards for government employment were, in this view, now threats. Mitch Daniels, Director of the Office of Management and Budget, explained, “Our adversaries are not encumbered by a lot of rules. Al-Qaida does not have a three-foot thick code.”²²³ Senator Robert Byrd (D-W.Va.) argued, “Since when did al-Qaida become our role model for labor-management relations?”²²⁴ Still, the type of argument advanced by Daniels has been repeated. Terrorism “does not have a bureaucracy,” said Gordon England, Deputy Secretary of Homeland Security.²²⁵ “It is very lean, very

216. *Id.* at 277 (citing sources).

217. *Id.* at 226-27.

218. Bernard D. Meltzer & Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731 (1983).

219. *See id.* (discussing the PATCO strike and its implications on the future of the federal antistrike policy); *see also* Selzer, *supra* note 105, at 376-79 (discussing the PATCO strike’s impact).

220. 148 CONG. REC. S9373 (daily ed. Sept. 26, 2002).

221. 148 CONG. REC. S9190 (daily ed. Sept. 25, 2002).

222. 148 CONG. REC. S9195 (daily ed. Sept. 25, 2002).

223. 148 CONG. REC. S7730 (daily ed. July 31, 2002) (*quoted in* statement of Sen. Byrd).

224. *Id.*

225. Tamara Audi, *Homeland Defenders Cite Burnout Dangers*, DETROIT FREE PRESS,

quick, very agile and therefore we need to be the same way or we'll lose."²²⁶ Most directly, Senator Gramm asked, "Do we really want some work rule negotiated prior to 9/11 to prevent us from finding somebody who is carrying a bomb on a plane with your momma?"²²⁷

1. Overcoming Inaccurate Stereotypes in History

In the early twentieth century, stereotypes about inherent union inefficiency were common. They often combined with claims that union workers would exhibit divided loyalty, torn between conflicting duties to labor and to employers. In 1920 a Texas court, upholding a bar on a firefighters' union, explained: "an employer cannot have undivided fidelity, loyalty, and devotion to his interests from an employee who has given to an association right to control his conduct."²²⁸ Indeed, a "man who is by agreement . . . shackled in his faculties—even his freedom of will—may well be considered less useful or less desirable by some employers . . ."²²⁹ In 1917 the Illinois Supreme Court upheld a ban on a teachers' union in Chicago because it would be "prejudicial to the efficiency of the teaching force."²³⁰ In 1919 Edwin Curtis, the Commissioner of Police in Boston, helped trigger the Boston police strike of 1919 by banning union affiliation by police officers on divided loyalty grounds.²³¹ Curtis claimed that a policeman trying "to serve two masters" would fail either as an officer or "in his obligation to the organization that controls him."²³²

As with the DHS debates, union opponents in this era stressed these arguments most when public safety workers were involved. Many jurisdictions barred police officers from organizing unions. For example, in 1919 officials in Washington, D.C. instituted such a ban, citing "divided loyalty."²³³ In 1920 a Texas court upheld the power of local authorities to dismiss members of a firefighters' union, noting that the union had not specifically pled that union membership would not affect firefighters' loyalty.²³⁴ As late as 1963, the Michigan Supreme Court upheld a bar on police unionizing, stressing the need for "undivided allegiance."²³⁵

Feb. 26, 2003, at 1A, 7A.

226. *Id.*

227. 148 CONG. REC. S8710 (daily ed. Sept. 18, 2002).

228. *McNatt v. Lawther*, 223 S.W. 503, 505 (Tex. Ct. App. 1920).

229. *Id.* at 506.

230. *Fursman v. City of Chicago*, 116 N.E. 158, 158 (Ill. 1917) (quoting rule 93a as amended on September 29, 1915 by Chicago's board of education).

231. SLATER, *supra* note 14, at 26.

232. *Id.* at 29 (quoting General Order 110 issued by Police Commissioner Curtis).

233. *Id.* at 20, 22.

234. *San Antonio Fire Fighters' Local Union No. 84 v. Bell*, 223 S.W. 506, 511 (Tex. Ct. App. 1920).

235. *AFSCME Local 201 v. City of Muskegon*, 120 N.W.2d 197, 201 (Mich. 1963).

Beginning with the New Deal era, however, claims about union disloyalty and inherent inefficiency became increasingly rare. The watershed in the private sector came in 1935 with the passage of the NLRA.²³⁶ The NLRA's findings and declaration of policy stated that "protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury" and declared it to be national policy to avoid such injuries "by encouraging the practice and procedure of collective bargaining" and protecting the right to organize unions.²³⁷ Around the same time, "industrial pluralist" scholars such as John Commons were producing influential works arguing that unions could be and were sources of efficiency in industry and justice in society.²³⁸

The NLRA did not apply to public sector unions,²³⁹ and the move to apply "industrial pluralist" theories to government employment came later. But beginning in the 1960s, similar ideas started to appear in public sector labor statutes. For example, in the federal sector, the findings and purpose section of the FSLMRA states that "experience in both private and public employment indicates that" the right of workers to organize and bargain collectively "safeguards the public interest" and "contributes to the effective conduct of public business."²⁴⁰ Thus, policymakers had rejected anti-union stereotypes.

2. Modern Debates: Unions As Inefficient and Possibly Disloyal

Nonetheless, the DHS debates reverted to pre-New Deal caricatures of unions, featuring not only charges of inefficiency but also veiled accusations of divided loyalty. Senator Mitch McConnell (R-Ky.) complained that the DHS bill was "being held up because some labor unions want to put their special interests ahead of the collective interests of the Nation's security."²⁴¹ Senator Robert Bennett (R-Utah) said that the Nelson-Breaux-Chafee compromise was "enough of a crack in the door, for some future union leader . . . for reasons totally unrelated to the mission of the Department . . . [to] decide that he or she wants to pick a fight with the President."²⁴²

Proponents of worker rights replied that there was no evidence that

236. National Labor Relations Act, 29 U.S.C. § 151-169 (1994).

237. 29 U.S.C. § 151.

238. See MELVYN DUBOFSKY, *THE STATE AND LABOR IN MODERN AMERICA* 109, 124-31, 156 (1994); Bruce E. Kaufman, *John R. Commons and the Wisconsin School on Industrial Relations Strategy and Policy*, 57 *INDUS. & LAB. REL. REV.* 3 (2003).

239. See 29 U.S.C. § 152(3). The NLRA excludes employees of "the United States . . . or any State or political subdivision thereof." 29 U.S.C. § 152(2).

240. 5 U.S.C. § 7101(a) (2000).

241. 148 *CONG. REC.* S9685 (daily ed. Oct. 1, 2002).

242. 148 *CONG. REC.* S9384 (daily ed. Sept. 26, 2002).

civil service or bargaining led to any problems surrounding 9/11 or impeded the fight against terrorism; indeed, nobody even claimed such a link existed.²⁴³ In response to an inquiry from a House lawmaker, OPM could not cite any examples of unions compromising national security.²⁴⁴ As one commentator observed, “[C]riticism of the nation’s homeland security preparedness has largely been directed at the lack of coordination and accountability of federal agencies, not at the . . . level of performance of workers in the agencies merged into the new DHS. Thus it makes little sense to strip workers of collective bargaining rights”²⁴⁵

Still, anti-union stereotypes appeared not only in Congressional debates, but also in policy papers that both reflected and influenced administration policy on federal personnel matters. The Heritage Foundation issued a report that repeatedly depicted labor unions as self-interested impediments to providing services.²⁴⁶ The report charged that federal sector unions are primarily “committed to strengthening their political clout.”²⁴⁷ Unions are “at best, responsible [only] to their members. At worst, they represent the permanent government acting on its own self-interest”²⁴⁸ The report’s antipathy to collective bargaining is clear. It characterized President Bill Clinton’s Executive Order 12871, which created “labor-management partnerships” as “turning the Administration over to federal labor unions.”²⁴⁹ In fact, the order merely encouraged federal agencies to discuss permissive topics of bargaining with unions.²⁵⁰ Agency managers always had the discretion to impose their proposals on these topics, and there were no sanctions for not taking part in partnerships.²⁵¹ Indeed, the OPM found that these partnerships reduced labor-management conflicts while improving labor-management communications.²⁵² Yet such objections to unions, again with little or no

243. See generally Gordon Lafer, *Fighting on Two Fronts*, DISSENT, Fall 2002, at 5 (discussing government activities post 9/11 and their impact on labor).

244. Masters & Albright, *supra* note 3, at 77; see also Donald G. Aplin, *AFGE Charters National Air Screener Local, Challenges Legality of TSA Bargaining Ban*, 41 Gov’t Empl. Rel. Rep. (BNA) No. 2000, at 253 (Mar. 11, 2003) (“TSA did not make a finding that screener unions would interfere with its national security mission . . .”).

245. Thessin, *supra* note 83, at 531.

246. Nesterczuk, *supra* note 62, at 1.

247. *Id.*

248. *Id.* at 24.

249. *Id.* at 3-5.

250. See Exec. Order No. 12,871, 58 Fed. Reg. 52,201 (Oct. 6, 1993) (establishing the National Partnership Council and implementing labor-management partnerships throughout the executive branch).

251. *Id.*

252. See Masters & Albright, *supra* note 3, at 81 (citing U.S. OFFICE OF PERSONNEL MGMT., *Labor-Management Partnership: A Report to the President* (Dec. 2000), at <http://www.opm.gov/lmr/report> (last visited Feb. 1, 2004)). The Heritage Foundation report ultimately admits that the Order’s effect was only “recommending” that agency heads be

actual support, were a palpable force in the debate.

3. Advocates of Worker Rights Also Fail to Use Broader Perspectives

Proponents of worker rights made surprisingly few efforts to counter these claims with evidence from the broader world of labor relations. They did note that unionized federal workers had not caused any security problems. In this regard, Senator Paul Sarbanes (D-Md.) cited the 200,000 DOD workers with bargaining rights. "Many of those employees have high-level security clearances," Sarbanes noted, but this "never seemed to impair our national security"²⁵³

Proponents did cite the broad powers that federal managers already have under existing law. Senator Lieberman stressed the limits on negotiable topics in the FSLMRA, noting that this law already gave agencies the power to act unilaterally during emergencies.²⁵⁴ Claims that union contracts interfere with security by tying the hands of managers with "silly union work rules" . . . are simply not true," Lieberman insisted.²⁵⁵ "When lives are at stake . . . a [f]ederal manager can impose any changes in assignments immediately, without dealing with unions at all."²⁵⁶ AFGE's Harnage agreed that "[e]very contract . . . can be waived or suspended by management unilaterally during an emergency."²⁵⁷ More generally, Senator Daniel Akaka (D-Haw.) quoted U.S. Comptroller General David Walker's conclusion that federal agencies already had considerable flexibility.²⁵⁸ AFGE cited an OPM publication stating that current law provided managers with many "flexibilities."²⁵⁹ Senator Byrd quoted a study from the nonpartisan Partnership for Public Service, concluding that

"cooperative." Nesterczuk, *supra* note 62, at 25.

253. 148 CONG. REC. S11,194 (daily ed. Nov. 15, 2002).

254. 148 CONG. REC. S9197 (daily ed. Sept. 25, 2002).

255. *Id.*

256. *Id.*; see also 5 U.S.C. § 7106(a)(2)(D) ("[N]othing in this chapter shall affect the authority of any management official of any agency . . . to take whatever actions may be necessary to carry out the agency mission during emergencies.").

257. Tom Ramstack, *Defiant Airport Screeners Join Union; Federal Employees Begin Challenge to Ban on Bargaining*, WASH. TIMES, Mar. 4, 2003, at A1.

258. 148 CONG. REC. S8888-89 (daily ed. Sept. 19, 2002).

259. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, YOU ALREADY HAVE THE FLEXIBILITY YOU SEEK 3 (2002), at <http://www.afge.org/Documents/HSAFGEReport.pdf> (last visited Feb. 1, 2004) (referencing OFFICE OF PERSONNEL MANAGEMENT, HUMAN RESOURCES FLEXIBILITIES AND AUTHORITIES IN THE FEDERAL GOVERNMENT (July 25, 2001), at http://www.opm.gov/omsoc/hr-flex/HR_flex.pdf (last visited Feb. 1, 2004)); see also Jacqueline Simon, AFGE, *Dismantling the Civil Service: A Labor Perspective on Developments Affecting Federal Labor Relations*, 7 PERSPECTIVES ON WORK 27, 28 (Industrial Relations Research Association, 2003) (stating that OPM found a vast array of flexibilities for agency managers).

existing personnel rules in Title 5 “allowed government agencies to emulate high-performing workplaces.”²⁶⁰

Still, there were only fleeting references to the experiences of unionized workers or policy decisions about labor generally. Senator Jon Corzine (D-N.J.) complained that the Republican bill “undermines . . . a national commitment to the right to organize.”²⁶¹ Senator Sarbanes asserted that “[w]e have spent a long part of our history working out these employee rights, and they are important to the success of the Government.”²⁶² Senator Jeff Bingaman (D-N.M.) added, “All employees—whether they be in the public or the private sector—deserve to be protected against the arbitrary treatment” the Republican bill would allow.²⁶³ Senator Bingaman went on to note that long-established practices in government service had “worked well through national crises of all kinds” and that there was no evidence that the system had broken down in the past or that it would break down in this instance.²⁶⁴

Some proponents of union rights did make a point that is supported by the broader industrial relations literature: unions often improve morale and therefore improve employee retention. Representative Albert Wynn (D-Md.) insisted that if DHS workers “do not feel secure that they receive fair consideration for their employment concerns,” it would cause “a loss of morale.”²⁶⁵ Senator Sarbanes agreed that “[t]aking these rights away . . . will undercut the morale of these employees. We will get lesser performance . . .”²⁶⁶ But these union proponents did not discuss the evidence that unions actually do positively impact employee retention in a variety of contexts.

4. Ignoring Unionized Public Safety Workers

As in old debates over police and fire departments, questions of efficiency and loyalty were heightened in the DHS debates because these jobs involve public safety. Even in the past forty years, police and firefighters have been treated as somewhat special cases, at least in that they are not allowed to strike even where other public workers can.²⁶⁷

260. 148 CONG. REC. S8068 (daily ed. Sept. 3, 2002).

261. 148 CONG. REC. S9407 (daily ed. Sept. 26, 2002).

262. 148 CONG. REC. S11,194 (daily ed. Nov. 15, 2002).

263. 148 CONG. REC. S11,373 (daily ed. Nov. 19, 2002).

264. *Id.*

265. 148 CONG. REC. H8593 (daily ed. Nov. 13, 2002).

266. 148 CONG. REC. S11,194 (daily ed. Nov. 15, 2002). Some academics have echoed this concern. *See, e.g.*, Thessin, *supra* note 83, at 514 (“[D]epriving DHS employees of collective bargaining and civil service rights is both unfair and counterproductive. Instead of improving homeland security, such a move will likely demoralize” federal workers.).

267. KEARNEY, *supra* note 16, at 236-38 (documenting permissive state strike legislation

Notably, however, these limitations have not prevented police and firefighters from being among the most highly unionized professions in the country.²⁶⁸ Further, a majority of states give police and firefighters full bargaining rights.²⁶⁹ Yet, as shown above, opponents of worker rights stress that collective bargaining rights are unwise because of the DHS's public safety responsibilities.

It is especially disappointing, therefore, that the few references to other public safety workers in the DHS debates were attempts by Democrats to argue that the bargaining rights of police and firefighters in New York City had not interfered with their ability to respond to the 9/11 attacks. It is, of course, relevant that these front-line public workers were unionized, had bargaining rights, and behaved both efficiently and bravely (nearly 350 of them lost their lives).²⁷⁰ "[T]he heroes of September 11 were union members," insisted Senator Boxer.²⁷¹ These union members were "working people . . . who were afforded the protections of collective bargaining. . . . They never looked at their watch and said: 'Oh, gee, I have been on the 74th floor of the World Trade Center, and now I have worked eight hours and I am coming down.'"²⁷² Senator Feinstein echoed that the "firefighters who ran up the stairs to their deaths did not see any conflict between worker rights and emergency response."²⁷³ Senator Jack Reed (D-R.I.) added, "No one checked with their bargaining agent before going up those stairs . . . They went up those stairs because it was their job and their duty . . ."²⁷⁴

But there was insufficient analysis of the effects of bargaining rights for public safety workers in other contexts. Senator Corzine did mention that unionization and bargaining is common for such workers. "Union membership of law enforcement and firefighters across the nation is unquestioned and standard procedure. Their collective bargaining rights did not undermine national security. And their work rules did not stop them from demonstrating a high level of professionalism . . ."²⁷⁵ Senator Thomas Daschle (D-S.D.) made the only other link to public safety workers. He quoted a letter from the National Association of Police

in table 8.2).

268. See *id.* at ch. 3.

269. Twenty-eight states permit police to bargain collectively, and one state allows individual counties the option to permit such bargaining. Thirty-one states permit firefighters to bargain collectively, and one state allows individual counties the option to permit such bargaining. KEARNEY, *supra* note 16, at 60-61 (documenting state bargaining legislation from 1999 in table 3.2).

270. See Masters & Albright, *supra* note 3, at 67.

271. 148 CONG. REC. S8072 (daily ed. Sept. 3, 2002).

272. *Id.*

273. 148 CONG. REC. S8888 (daily ed. Sept. 19, 2002).

274. 148 CONG. REC. S8057 (daily ed. Sept. 3, 2002).

275. 148 CONG. REC. S9407 (daily ed. Sept. 26, 2002).

Organizations (which represents 220,000 police officers across the country) that supported collective bargaining rights for DHS workers.²⁷⁶ After noting that “[e]very NYPD and NY/NJ Port Authority officer who died that day was . . . working under a collective bargaining agreement,” the letter stated that “Congress has long recognized the benefits of a mutual working relationship between labor and management” and that a broad range of public workers enjoyed bargaining rights.²⁷⁷

As dramatic (albeit ultimately ineffective) as the examples from 9/11 were, Congress should have looked at the effect of collective bargaining on public safety workers generally. It can be debated whether police and firefighters are exactly analogous to, for example, border patrol agents or customs officers. But surely the comparison would be useful. While DHS workers certainly have duties that implicate important safety issues, it is likely that police officers in many cities confront serious safety issues at least as frequently. And there is no evidence that the collective bargaining rights that police and firefighters enjoy in a majority of states have interfered with their ability to protect public safety.²⁷⁸

5. The “Nobody Ever Gets Fired” Idea

A recurring subtheme of the union inefficiency charge is the managers’ alleged inability to fire unionized federal workers. During the DHS debates, Ari Fleischer gave a hypothetical example in which union representation could stop a drunken border patrol agent’s discharge.²⁷⁹ Senator Miller claimed that a “[f]ederal worker caught drunk on the job can’t be fired for 30 days, and then he has the right to insist on endless appeals.”²⁸⁰ Senator Orrin Hatch (R-Utah) insisted that it can take “18 months to fire a terrible worker.”²⁸¹ Senator Byrd replied, “I do not see anyone defending drunken workers,” and labeled Fleischer’s comments a “needless and irresponsible cheap shot” at federal employees.²⁸² Policymakers should consult the actual experiences of unionized employers to determine whether this was a “cheap shot” or not. In fact, it appears that it was.

Advocates of bargaining rights did produce data specific to federal employment that challenged this stereotype. Senator Richard Durbin (D-

276. 148 CONG. REC. S10,621-22 (daily ed. Oct. 17, 2002) (quoting a letter from William J. Johnson to the Senate).

277. *Id.*

278. See KEARNEY, *supra* note 16, at 232-34 (discussing the different treatment of unionized public workers engaged in “essential services”).

279. Masters & Albright, *supra* note 3, at 76.

280. 148 CONG. REC. S8708 (daily ed. Sept. 18, 2002).

281. 148 CONG. REC. S9208 (daily ed. Sept. 25, 2002).

282. 148 CONG. REC. S7729 (daily ed. Aug. 1, 2002).

Ill.) noted that “[i]n fiscal year 2001, 8,920 Federal employees were terminated and removed for disciplinary reasons.”²⁸³ Democrats also explained that while most federal workers get 30 day notices of hearings, before being fired,²⁸⁴ they can be removed from the job and banished from the workplace immediately, pending the hearing.²⁸⁵ Senator Akaka added that under the FSLMRA, managers can remove workers from their posts and suspend them immediately without pay for national security reasons.²⁸⁶

Also along these lines, AFGE published a report that listed court cases upholding terminations of federal employees for at least thirty-five types of behavior, including, but not limited to endangering public health or safety;²⁸⁷ insubordination;²⁸⁸ failure to perform duties in an acceptable manner;²⁸⁹ failure to meet the physical and emotional requirements of the job;²⁹⁰ revealing nonpublic information;²⁹¹ alcohol-related conduct;²⁹² absence without approved leave;²⁹³ making false statements;²⁹⁴ excessive errors;²⁹⁵ sleeping on duty;²⁹⁶ and gambling.²⁹⁷ AFGE also noted that

283. 148 CONG. REC. S9193 (daily ed. Sept. 25, 2002).

284. *Unions Fear Bush Will Abuse Freedom from Civil Service Rules*, PITTSBURGH POST-GAZETTE, Nov. 17, 2002, at A14-15; see, e.g., *Jones v. Dep't of the Navy*, 978 F.2d 1223, 1226 (Fed. Cir. 1992) (holding that the Navy could suspend two employees for an indefinite period when such a suspension “will promote the efficiency of the service.” (quoting 5 U.S.C. § 7513 (1988))). See generally AM. FED'N OF GOV'T EMPLOYEES, *supra* note 259, at 4 (describing the federal managerial flexibility that has already been established through the Civil Service Reform Act of 1978).

285. *Jones*, 978 F.2d at 1226.

286. 148 CONG. REC. S8888-89 (daily ed. Sept. 19, 2002). Specifically, Senator Akaka refers to and is supported by the following statutory provision:

[T]he head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. . . . [T]he head of an agency may remove an employee suspended under subsection (a) of this section when, after such investigation and review as he considers necessary, he determines that removal is necessary or advisable in the interests of national security.

5 U.S.C. § 7532(a)-(b) (2000).

287. AM. FED'N OF GOV'T EMPLOYEES, *supra* note 259, at 7 (citing *L'Bert v. Dep't of Veterans Affairs*, 88 M.S.P.R. 513 (M.S.P.B. 2001)).

288. *Id.* at 8 (citing *Luciano v. Dep't of the Treasury*, 88 M.S.P.R. 335 (M.S.P.B. 2001)).

289. *Id.* (citing *Belcher v. Dep't of the Air Force*, 82 M.S.P.R. 230 (M.S.P.B. 1999)).

290. *Id.* (citing *Bullock v. Dep't of the Air Force*, 88 M.S.P.R. 531 (M.S.P.B. 2001)).

291. *Id.* (citing *Gibb v. Dep't of the Treasury*, 88 M.S.P.R. 135 (M.S.P.B. 2001)).

292. *Id.* (citing *Edwards v. Dep't of the Army*, 87 M.S.P.R. 27 (M.S.P.B. 2000)).

293. *Id.* (citing *Wooten v. Office of Pers. Mgmt.*, 87 M.S.P.R. 680 (M.S.P.B. 2001)).

294. *Id.* at 8 (citing *Wooten*, 87 M.S.P.R. at 680 (falsifying work records); *Jones v. Dep't of Justice*, 87 M.S.P.R. 91 (M.S.P.B. 2000) (falsifying job applications); *Wheeler v. Dep't of the Army*, 47 M.S.P.R. 240 (M.S.P.B. 1991) (falsifying medical information); *Raymond v. Dep't of the Army*, 34 M.S.P.R. 476 (M.S.P.B. 1987) (falsifying expense accounts); *Watson v. Dep't of the Air Force*, 34 M.S.P.R. 656 (M.S.P.B. 1987) (falsifying time cards)).

295. *Id.* (citing *Taylor v. Dep't of the Air Force*, 80 M.S.P.R. 450 (M.S.P.B. 1998)).

296. *Id.* (citing *Bond v. Dep't of Energy*, 82 M.S.P.R. 534 (M.S.P.B. 1999)).

federal workers can be removed without cause during their probationary year.²⁹⁸ AFGE noted that federal managers have nonnegotiable power to set performance standards.²⁹⁹ Thus, an employee may be removed for receiving a rating of “unacceptable” on a single “critical element” of the job’s requirements.³⁰⁰ Further, a termination for poor performance “is upheld as long as there is *some* evidence to support the manager’s conclusion.”³⁰¹

Further, this debate ignored the experiences of unions in other contexts. Senator Craig Thomas (R-Wyo.) cited a private sector example on the Administration’s behalf, claiming that “two America West pilots showed up to work drunk . . . on Monday and were fired on Tuesday. If they had been INS personnel, it would have taken 18 months . . . to be held accountable.”³⁰² Senator Thomas did not seem to appreciate that under the RLA, private sector pilots have the right to bargain collectively.³⁰³ Fundamentally, both sides failed to include relevant evidence from the vast world of labor relations. Colleen M. Kelley, President of the National Treasury Employees Union (NTEU), characterized the federalized airport security screeners inability to have union representation as “an insult to . . . a broad range of hard-working public employees,” but she did not explain how the experiences of such other employees were applicable to the current debate.³⁰⁴ Thus, the debate ignored a wealth of literature on what unions actually do.

6. Industrial Relations Literature and Evidence That Unions Increase Efficiency

Many scholars have analyzed the effects of unions, collective bargaining, and labor laws in a variety of contexts, including books and

297. *Id.* at 9 (citing *Howard v. U.S. Postal Serv.*, 26 M.S.P.R. 393 (M.S.P.B. 1985)).

298. *Id.* at 4 (citing *Vilt v. U.S. Marshals Serv.*, 16 M.S.P.R. 192 (M.S.P.B. 1983)).

299. *Id.*

300. *Id.*

301. *Id.* (emphasis in original) (citing *Martin v. Fed. Aviation Admin.*, 795 F.2d 995, 997 (Fed. Cir. 1986) (illustrating that the standard to uphold a performance-based termination is relatively low); 5 U.S.C. § 7701(c)(1)-(c)(1)(A) (2000) (“[T]he decision of the agency shall be sustained . . . only if the agency’s decision—in the case of an action based on unacceptable performance . . . is supported by substantial evidence . . .”).

302. 148 CONG. REC. S8069 (daily ed. Sept. 3, 2002).

303. See 45 U.S.C. § 152 (2000) (“Employees shall have the right to organize and bargain collectively. . . .”).

304. Press Release, The National Treasury Employees Union, NTEU’s Kelley Calls TSA Anti-Union Decision “An Insult” to Public Employees Fighting Terrorism (Jan. 10, 2003), available at <http://www.nteu.org/Presskits/PressRelease/PressRelease.aspx?ID=404> (last visited Feb. 1, 2004).

articles in various industrial relations journals.³⁰⁵ While differences of opinion exist, and data can vary among different types of workplaces, considerable evidence shows that unionized workplaces often increase productivity and efficiency. These works should be used to help understand the effect of bargaining in the federal sector. The future of federal employment and homeland security is too important to be left to anecdotes and stereotypes.

a. Examples and Summary of Relevant Studies

Data showing that unions have a positive effect come from sources that range from international surveys to analyses of specific types of employers. At the broadest level, in 2002, the World Bank released a report based on more than 1,000 studies on the effects of unions and collective bargaining.³⁰⁶ This report found that countries with high unionization rates tend to have higher productivity, less pay inequality, and lower unemployment.³⁰⁷ It found that workers who belong to unions are generally better trained than their nonunion counterparts and that unions also help retain workers.³⁰⁸ Overall, having a large number of workers represented by unions tends to have a stabilizing and beneficial effect on a country's economy.³⁰⁹ At the other end of the spectrum, there are studies of specific types of public sector unions in the United States. For example, evidence shows that unionization of teachers correlates positively with higher student scores on standardized tests and higher graduation rates.³¹⁰

Regarding American unions generally, Freeman and Medoff's *What Do Unions Do?* is arguably the classic book in the industrial relations field.³¹¹ Several of their findings are relevant here. First, by providing workers with a voice in determining work rules and conditions, and by creating grievance and arbitration procedures, unions greatly reduce the probability that workers will quit.³¹² Thus, unionized workforces are more

305. See, e.g., ADVANCES INDUS. & LAB. REL.; COMP. LAB. L. & POL'Y J.; INDUS. & LAB. REL. REV.; INDUS. REL.; J. COLLECTIVE NEGOTIATIONS IN PUB. SECTOR; J. LAB. RES.; LAB. STUD. J.; Industrial Relations Research Association publications.

306. World Bank, Unions and Collective Bargaining: Economic Effects in a Global Environment (2002), available at http://publications.worldbank.org/ecommerce/catalog/product?item_id=1061824.

307. *Id.*

308. *Id.*

309. *Id.*

310. Lala Carr Steelman et al., *Do Teacher Unions Hinder Educational Performance? Lessons Learned from State SAT and ACT Scores*, 70 HARV. EDUC. REV. 437, 448-59 (2000).

311. RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* (1984).

312. *Id.* at 96.

stable than nonunion workforces with comparable pay.³¹³ Second, management in unionized companies generally operates more “by the book.”³¹⁴ This can mean less flexibility, but it can also mean acting in a more professional and less arbitrary or authoritarian way.³¹⁵ Third, Freeman and Medoff found that in many sectors unionized establishments are more productive than nonunion establishments, while in only a few cases do they result in lower productivity.³¹⁶ The higher productivity is due in part to lower turnover rates, improved managerial performance in response to unions, and cooperative labor-management relations at the plant level.³¹⁷ Unions also promote the ability of individual workers to speak freely, allow workers to deal with management efficiently with one collective voice, gain information for workers, monitor employer behavior, and equalize bargaining power.³¹⁸

This is the clear majority view. A recent survey of the topical literature concluded that “[t]here is scant evidence that unions act to reduce productivity . . . while there is substantial evidence that unions act to improve productivity in many industries.”³¹⁹ Barry Hirsch offers a minority, dissenting view arguing that unions do not, on average, increase productivity.³²⁰ Unionization may lead initially to productivity gains due to the effects of “shock,” when management must initially respond to unions by organizing more efficiently, thereby reducing slack, or due to the effects of “collective voice” when unions allow workers to voice their preferences more effectively.³²¹ Hirsch then questions whether any long-term

313. *Id.* at 94-110.

314. *Cf. id.* at 111-21 (discussing the effects of unions upon firms’ adjustments to business cycles).

315. *Id.*

316. *Id.* at 162-80.

317. *Id.*

318. *Id.*

319. Dale Belman & Richard N. Block, *The Impact of Collective Bargaining on Competitiveness and Employment: A Review of the Literature*, in BARGAINING FOR COMPETITIVENESS: LAW, RESEARCH, AND CASE STUDIES 51 (Richard N. Block ed., 2003); see also, LAWRENCE MISHEL & MATTHEW WALTERS, ECON. POLICY INST., HOW UNIONS HELP ALL WORKERS 15 (2003), available at <http://www.epinet.org/briefingpapers/143/bp143.pdf> (last visited Feb. 1, 2004) (“Analyses of the union effect on firms and the economy have generally found unions to be a positive force, improving the performance of firms and contributing to economic growth.” (citations omitted)). This paper refers to Hirsch’s work, *infra* note 320, as “a dissenting view” and concludes that there was “nothing in the extensive economic analysis of unions to suggest that there are economic costs that offset the positive union impact on the wages, benefits, and labor protections of . . . workers.” *Id.*

320. Barry T. Hirsch, *Unionization and Economic Performance: Evidence on Productivity, Profits, Investment, and Growth*, in UNIONS AND RIGHT-TO-WORK LAWS: THE GLOBAL EVIDENCE OF THEIR IMPACT ON EMPLOYMENT 35 (Fazil Mihlar ed., 1997). I thank Professor Hirsch for sharing this paper with me.

321. *Id.* at 42.

productivity gains are associated with unionization.³²² He notes that some studies have not found positive effects on productivity in certain government agencies.³²³ For example, he cites a study which found that police unions could somewhat diminish productivity regarding minor crimes (no effect was found for serious crimes).³²⁴

Notably, part of Hirsch's argument is based on his finding that "unions significantly increase compensation for their members but do not increase productivity sufficiently to offset the cost increases from higher compensation."³²⁵ While the question of whether higher wages are fully offset by productivity gains is important in the private sector, it is irrelevant in the federal sector, because wages are not negotiable.³²⁶ Moreover, in the context of national security, one could argue that increased productivity and efficiency is the central goal. It is vital, therefore, to study the industrial relations literature with an eye for what lessons are transferable to the federal sector and to the DHS.

The combined teaching of most industrial relations literature on efficiency is that while unions increase productivity in most circumstances, they can decrease it in others.³²⁷ Making policy for any particular type of

322. *Id.* at 42-49.

323. *Id.* at 46-47.

324. *Id.* at 47 (citing Dennis Byrne et al., *Unions and Police Productivity: An Econometric Investigation*, 35 INDUS. REL. 566, 580-81 (1996)).

325. *Id.* at 35.

326. *See infra* Section II.B.1.

327. In 1992, Freeman wrote that "[t]he majority of studies find that union firms have higher productivity, but there are well-documented exceptions." Richard Freeman, *Is Declining Unionization of the U.S. Good, Bad, or Irrelevant?*, in UNIONS AND ECONOMIC COMPETITIVENESS 143, 156 (Lawrence Mishel & Paula B. Voos eds., 1992) (citing studies on union productivity effects in 1986 and more recently). For other works consulted to derive this conclusion, see BARRY T. HIRSCH, *LABOR UNIONS AND THE ECONOMIC PERFORMANCE OF FIRMS* (1991) (examining the impact of collective bargaining on the economic performance of publicly traded U.S. manufacturing companies in the 1970s); Steven G. Allen, *Unionization and Productivity in Office Building and School Construction*, 39 INDUS. & LAB. REL. REV. 187, 187-201 (1986) (comparing the difference in productivity between union and nonunion contractors within two samples taken from the 1970s); Adrienne E. Eaton & Paula B. Voos, *Productivity-Enhancing Innovations in Work Organization, Compensation, and Employee Participation in the Union Versus the Nonunion Sectors*, in 6 ADVANCES IN INDUSTRIAL AND LABOR RELATIONS 63-103 (David Lewin & Donna Sockell eds., 1994) (discussing studies which compare productivity levels in the union sector to the nonunion sector; finding that unionized firms engage in productivity enhancing projects to a greater extent than the profit-sharing programs common in the nonunion sector); Casey Ichniowski, *The Effects of Grievance Activity on Productivity*, 40 INDUS. & LAB. REL. REV. 75, 75-90 (1986) (examining the relationship between grievance filing rates and economic performance; concluding that nonunion mills have lower productivity); Daniel B. Cornfield, *Labor Union Responses to Technological Change: Past, Present, and Future*, PERSPECTIVES ON WORK 35-38 (1997) (discussing the response of labor unions to technological change). I thank the many industrial relations scholars on the IRRA listserve who helped me with this issue.

employer requires a more fine-grained analysis. For example, a recent study found that unionized employers that promote joint decision-making coupled with incentive-based compensation have higher productivity than other similar nonunion plants, while unionized employers that maintain more traditional labor management relations may have lower productivity.³²⁸ Another study found that unionized firms in the mining and office construction fields were significantly more productive than nonunion firms in the same fields.³²⁹ But this increased productivity disappeared where the labor relations climate worsened (measured by higher rates of grievances, wildcat strikes, and other conflicts).³³⁰ These findings suggest that those at the DHS and other federal agencies interested in maximizing efficiency should devote their efforts to promoting joint decisionmaking and encouraging a positive labor relations climate, rather than eliminating worker rights.

This article cannot conclusively show which industrial relations studies are the most persuasive regarding the precise contours of a new federal personnel system. But, it can point to studies showing that in many settings, unions increase efficiency, and it can also note the lack of hard evidence that unions necessarily hurt efficiency, especially if other effective labor relations tools are in place.

Of course, some differences between DHS workers and other types of unionized workers exist. But these differences can be overstated, and debates on the relative efficiency of employers using collective bargaining cannot take place in a vacuum. While the DHS is responsible for public safety, the public sector has considerable experience in forging bargaining rules for public safety workers.³³¹ Also, there are private sector workers covered by the NLRA or RLA—in the transportation, food, medical and energy industries, among others—whose duties are intimately connected to the public's safety, security, and health.

b. Input from Workers

Perhaps the most relevant point that policymakers can take from the industrial relations literature concerning these debates is that bargaining

328. See Sandra E. Black & Lisa M. Lynch, *How to Compete: The Impact of Workplace Practices and Information Technology on Productivity*, in 83 REVIEW OF ECON. & STATISTICS 434, 434-45 (2001) (finding that higher productivity is related more closely to how an employer implements a chosen work practice within the business rather than employer's choice of any particular work practice).

329. Dale Belman, *Unions, the Quality of Labor Relations, and Firm Performance*, in UNIONS AND ECONOMIC COMPETITIVENESS 50-51, 66-70 (Lawrence Mishel & Paula B. Voos eds., 1992).

330. *Id.*

331. See *infra* Section IV.C.4.

can increase efficiency because it facilitates effective input from workers. This input helps solve problems and prevents abusive or inefficient behavior by management. Along these lines, AFGE's Harnage claims that if the TSA had involved unions more, the agency might have avoided a number of problems that it has experienced.³³²

The TSA's employment problems were numerous, serious, and widespread.³³³ By March 2003, TSA workers around the country were complaining of low morale.³³⁴ They cited inadequate training (which they said had increased injury rates) and inadequate safety equipment (for example, no radiation detection badges for X-ray machine operators).³³⁵ They claimed that TSA managers showed favoritism toward screeners who formerly worked for private companies, and that the TSA had not disciplined supervisors guilty of sexual harassment.³³⁶

Scheduling problems were common: one screener said that he worked twenty-five straight days; another said screeners often work six or seven hour stretches without any bathroom or food breaks.³³⁷ Many complained of simply not knowing their schedules.³³⁸ Some screeners claimed they were not paid for over a month.³³⁹ TSA official David Stone admitted that on one payday alone in November 2002, 130 screeners at the Los Angeles International Airport did not receive paychecks.³⁴⁰ These types of problems were reported in cities including Orlando, New York, Boston, and Los Angeles.³⁴¹

The TSA's failure to deal with these issues created retention problems, as the industrial relations literature would predict.³⁴² In February 2003, the screener turnover rate was between 30% and 35% at airports where TSA had assumed staffing responsibilities.³⁴³ In Charlotte alone, thirty screeners resigned.³⁴⁴ Furthermore, problems may become worse, as the TSA, facing

332. Donald G. Aplin, *AFGE Challenges Ridge to Restore Screener Rights in DHS Workforce Reform*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2014, at 630 (June 17, 2003).

333. Donald G. Aplin, *AFGE Charters National Air Screener Local, Challenges Legality of TSA Bargaining Ban*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2000, at 253 (Mar. 11, 2003).

334. *Id.* at 254.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. Ricardo Alonso-Zaldivar, *Federal Airport Workers Tell of Pay Glitches, Employee Miscues, and Problems*, L.A. TIMES, Nov. 22, 2002, at A17.

341. See Ramstack, *supra* note 257, at A01; Barker, *supra* note 95, at H1.

342. See *infra* Section IV.C.6.

343. Letter from Bobby L. Harnage, Sr., National President, AFGE, to the Honorable Arlen Specter (R-Pa.) (Feb. 21, 2003), http://www.afge.org/Index.cfm?Page=AirportScreeners&File=2003_02_21_letter.htm (last visited Feb. 1, 2004).

344. See Ted Reed, *Union Targeting Screeners, but Security Workers May Be Ineligible*, CHARLOTTE OBSERVER, Nov. 20, 2002, at 1D.

a \$500 million dollar deficit and a major budget cut, is cutting back on screeners.³⁴⁵ In March 2003, TSA had 55,600 screeners, but it announced it would cut 6,000 workers in 240 airports by September 30.³⁴⁶

Many of these problems arguably involve the type of issues that giving workers a voice could have helped resolve. For example, federal sector unions can bargain over training and safety issues. While scheduling is a management right,³⁴⁷ unions can help gain information about schedules for their members, and can bring problems about scheduling to management's attention. Unions can also help by clarifying and explaining the rules. For example, a screener at Cincinnati-Northern Kentucky International Airport said that supervisors gave inconsistent orders as to how workers should respond when detection wands revealed metallic objects.³⁴⁸ Even TSA's Melendez said that the screener workforce is "probably our most important asset" and that "it's in TSA's best interest to work with screeners."³⁴⁹ Significant evidence indicates that bargaining creates an effective mechanism for employees to work with employers, giving employees a voice that improves quality and morale.³⁵⁰

Again, however, the debates did not discuss the pros and cons of bargaining as a mechanism for worker input. Tellingly, in all the debates on the DHS in the Congressional Record, there is only one voice of an actual federal worker. Senator Harry Reid (D-Nev.) quoted Mark Hall, a border patrol agent, who argued that union rights improve agency functioning.³⁵¹ Hall wrote that after he criticized what he felt was understaffing, management retaliated against him with a suspension, demotion, and reassignment.³⁵² An investigation revealed that Hall's sector chief had said that border patrol managers should have "no tolerance for dissent" and should "view resistance from the rank and file as insubordinate."³⁵³ Hall credited union rights both for giving him the courage to speak out and for enabling him to reverse the disciplinary actions. He concluded that "[o]ur union has helped me and my fellow officers make this nation a better and

345. See Donald G. Aplin, *TSA to Cut 6,000 Federal Airport Screeners; Budget Constraints*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2008, at 274 (May 6, 2003) (quoting the TSA's budget for fiscal year 2003 at \$5.98 billion, while its proposed budget for fiscal year 2004 is \$4.82 billion).

346. Stephen Barr, *Budget Shortfall Could Prompt Cutbacks in Airport Screeners*, WASH. POST, May 14, 2003, at B2; see also Barker, *supra* note 95, at H1.

347. See BROIDA, *supra* note 38, at ch. 6.

348. See Ramstack, *supra* note 257, at A01.

349. Donald G. Aplin, *AFGE Challenges Ridge to Restore Screener Rights in DHS Workforce Reform*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2014, at 630 (June 17, 2003).

350. See, e.g., Allen, *supra* note 327, at 187-201.

351. 148 CONG. REC. S10624 (daily ed. Oct. 17, 2002).

352. *Id.*

353. *Id.*

safer place.”³⁵⁴

D. Unions That Cannot Bargain Still Exist: Into the Discredited Past?

Significantly, bans on collective bargaining in federal employment today would not make unions disappear. Under case law that emerged in the 1960s, union *organizing*, is generally constitutionally protected.³⁵⁵ Indeed, unions at the TSA and elsewhere have promised to continue to represent their members even if they cannot bargain.³⁵⁶ Notably, before the 1960s there was a long history of public sector unions, including those in the federal sector, which existed without the right to bargain.³⁵⁷ Because this history may soon be replicated on a wide scale, policymakers should study it more closely to decide if this rejected past is truly a desirable destination.

Public sector unions were active long before they began winning the formal rights to organize and bargain in the 1960s.³⁵⁸ Union density in government was 10% to 13% from the late 1930s to the late 1950s; this was significant, given that by 1934, government bodies employed 3.3 million people.³⁵⁹ In this era, federal workers were marginally better off than other public workers, as the Lloyd-LaFollette Act of 1912 gave federal employees the right to form unions, albeit not to bargain.³⁶⁰ Thus today, significant parts of the federal workforce may be reverting to what federal workers had by law during the fifty years between the Lloyd-LaFollette Act and Kennedy's Executive Order, and what many state and local government workers had in fact during this era: the ability to join unions without the right to bargain.

1. What Did Unions Do Without Bargaining Rights?

In this “pre-collective bargaining” era, public sector unions engaged in

354. *Id.* (quoting statement from July 31, 2002); *see also* 148 CONG. REC. S8068 (daily ed. Sept. 3, 2002) (statement of Sen. Byrd) (discussing the incidents described by Hall).

355. *See, e.g.,* *Keyashian v. Bd. of Regents*, 385 U.S. 589, 609-10 (1967) (holding that public employment cannot be predicated on relinquishing right of association); *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1077 (W.D.N.C. 1969) (finding that a ban on firefighters unionizing violates the First Amendment).

356. *See infra* Section IV.D.2.

357. *See infra* Section IV.D.1. *See generally* SLATER, *supra* note 14

358. *See* SLATER, *supra* note 14, at ch. 3.

359. *Id.* at 82.

360. The *Lloyd-LaFollette Act* provided that federal employees could be discharged only for cause and that union membership was not cause if the union imposed no duty to strike. *Lloyd La Follette Act*, Pub. L. No. 336, 37 Stat. 555 (codified as amended in scattered sections of 5 U.S.C.).

three major types of activities to try to represent their members.³⁶¹ First, they used politics—from elections to lobbying to trying to enlist public pressure—in order to influence public officials who were employers.³⁶² Second, they represented workers under other legal frameworks such as in civil service hearings.³⁶³ Third, they engaged in “informal” bargaining, which in some cases led to quasi-collective agreements or at least understandings.³⁶⁴

Unions of federal workers used these tactics prior to the 1960s. Without the formal right to bargain, the AFL’s AFGE, the CIO’s United Federal Workers of America (UFWA), and the National Federation of Federal Employees campaigned for laws that would raise pay, improve civil service exams, require cause for discharge, and standardize rules.³⁶⁵ These unions also used informal bargaining.³⁶⁶ The UFWA explained that various types of “agreements” and “signed statements . . . serve the place of the contract that is used by an industrial union.”³⁶⁷ The unions took part in labor-management committees when they were available.³⁶⁸ They represented members in civil service hearings, and they distributed information to members regarding the often arcane rules of federal employment.³⁶⁹ Union efforts in these decades were often creative and sometimes effective, but because they lacked institutional rights, they often failed. Yet they continued to organize and press management in ways that most parties involved ultimately decided were less efficient than giving the workers some collective bargaining rights.³⁷⁰

Studies of the federal workplace in this era indicate that the older personnel systems were not effective. A recurring theme in public sector history becomes evident. The direct employer of labor, when allowed to make the “law,” gives workers too few rights. The desire of federal managers for power and discretion conflicts with the inevitable and beneficial reality of workers seeking a greater voice. Officials did institute some grievance procedures and employee participation programs.³⁷¹ But managers adjudicated all grievances, with the unsurprising result that management won almost all the cases.³⁷² Some supervisors even argued

361. See SLATER, *supra* note 14, at 91, 95.

362. *Id.* at 105-17.

363. *Id.* at 117-18.

364. *Id.* at 123.

365. RUNG, *supra* note 58, at 105-36.

366. *Id.* at 125-36.

367. SLATER, *supra* note 14, at 127.

368. RUNG, *supra* note 58, at 127-28.

369. SLATER, *supra* note 14, at 117-18.

370. *Id.* at 135-36.

371. *Id.* at 113-25.

372. *Id.*

against standardized procedures in principle, on the grounds that they would give employees a sense that they had "rights."³⁷³ Margaret Rung concludes that while some federal managers tried to include unions, they gave workers too little actual voice.³⁷⁴ In 1955 a government commission found that "the Federal government has lagged behind other organizations in recognizing the value of providing formal means for employee-management consultation."³⁷⁵

2. What Unions Are Doing Now at the TSA: History Repeating?

a. *Organizing and Fighting to Win Bargaining Rights*

Today, if denied bargaining rights, federal sector unions are likely to repeat behaviors from the first half of the twentieth century when they could not bargain. The example of the TSA, where bargaining has already been prohibited, is illustrative.

AFGE has continued to organize TSA workers despite Loy's Order, although not without resistance.³⁷⁶ AFGE originally tried to form separate locals at separate airports.³⁷⁷ By mid-February 2003, it had filed petitions for local unions at LaGuardia, Baltimore-Washington International, Orlando, Chicago-Midway, JFK, and ten other airports.³⁷⁸ Then the TSA took the position that screeners should not be allowed to form locals in individual airports but instead should be required to hold an election for a union that would cover all airports.³⁷⁹ This type of "multi-unit" organizing is traditionally more difficult for unions.³⁸⁰ Nonetheless, on March 3 AFGE chartered a nationwide local,³⁸¹ and by early May approximately 100 screeners had become dues-paying members of this local.³⁸²

AFGE's initial strategy includes a fight to win bargaining rights. *The*

373. *See id.* at 114-15.

374. RUNG, *supra* note 58, at 135.

375. NESBITT, *supra* note 203, at 15 (quoting U.S. COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF GOV'T, *Report of the Task Force on Personnel and Civil Service* 110 (1955)).

376. Donald G. Aplin, *AFGE Challenges Ridge to Restore Screener Rights in DHS Workforce Reform*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2014, at 629 (June 17, 2003).

377. *Id.*

378. Bacon, *supra* note 115, at 5.

379. *Id.*

380. *Id.* Perhaps not coincidentally, Clifford Hardt, a TSA manager, was the director for special projects for Federal Express. Federal Express had in the past used the strategy of insisting on a national bargaining unit. *Id.*

381. Donald G. Aplin, *AFGE Charters National Air Screener Local, Challenges Legality of TSA Bargaining Ban*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2000, at 253 (Mar. 11, 2003).

382. Donald G. Aplin, *TSA to Cut 6,000 Federal Airport Screeners; Budget Constraints, Efficiency, Drive Change*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2008, at 475 (May 6, 2003).

Orlando Sentinel described this battle as “Becoming ‘A Holy War.’”³⁸³ The newspaper reported that AFGE was “continuing its organizing blitz, targeting airport after airport in hopes that its legal challenges will prevail—or that political pressures might change the administration’s thinking.”³⁸⁴ On the political front, on June 11, 2003 Harnage wrote to Loy, asking him to reverse his order and arguing that the TSA had not given persuasive reasons why bargaining would compromise security.³⁸⁵ TSA official Brian Turmail replied that, in responding to threats about another “shoe bomber” around January 1, 2003, the TSA was able to “have more screeners on duty” and “order screeners to check shoes” without having to check work rules.³⁸⁶

AFGE has also tried litigation. In January 2003, the union filed a lawsuit claiming that Loy lacked the statutory authority to ban collective bargaining and that such an order violated constitutional guarantees of free speech, free association, and equal protection.³⁸⁷ AFGE argued that the law establishing the TSA mandated that the personnel system of the Federal Aviation Administration (FAA) would apply to the TSA, and that the FAA system requires collective bargaining.³⁸⁸ AFGE also argued that the DHS statute does not allow the head of the TSA to prohibit bargaining.³⁸⁹ On September 5, 2003, the district court for the District of Columbia dismissed this suit, finding that the court did not have jurisdiction over the claims and that the union’s recourse was with the FLRA.³⁹⁰ Also, the court found that Loy’s order did not violate the First Amendment, because the order prohibited bargaining, not organizing.³⁹¹ The union has promised to appeal. “We’re not going to abandon these employees,” said John Gage, the new

383. Barker, *supra* note 95, at H1.

384. *Id.*

385. Donald G. Aplin, *AFGE Challenges Ridge to Restore Screener Rights in DHS Workforce Reform*, 41 Gov’t Empl. Rel. Rep. (BNA) No. 2014, at 629 (June 17, 2003).

386. *Id.* at 629-30.

387. Donald G. Aplin, *AFGE Charters National Air Screener Local, Challenges Legality of TSA Bargaining Ban*, 41 Gov’t Empl. Rel. Rep. (BNA) No. 2000, at 253 (Mar. 11, 2003); Complaint for Declaratory and Injunctive Relief, *AFGE v. Loy*, No. 1-03-0043 (D.D.C. Jan. 10, 2003).

388. Donald G. Aplin, *AFGE Charters National Air Screener Local, Challenges Legality of TSA Bargaining Ban*, 41 Gov’t Empl. Rel. Rep. (BNA) No. 2000, at 253 (Mar. 11, 2003); Complaint, *supra* note 387, at 3 (citing Federal Aviation Administration’s personnel management system, 49 U.S.C. § 40122(a)-(g)(2) (2000); Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001)).

389. Donald G. Aplin, *AFGE Charters National Air Screener Local, Challenges Legality of TSA Bargaining Ban*, 41 Gov’t Empl. Rel. Rep. (BNA) No. 2000, at 253 (Mar. 11, 2003); Christopher Lee & Sara Kehaulani Goo, *TSA Blocks Attempt to Unionize Screeners*, WASH. POST, Jan. 10, 2003, at A19.

390. *AFGE v. Loy*, 173 L.R.R.M. 2358 (D.D.C. 2003).

391. *AFGE Must Pursue TSA Bargaining Rights Challenge Before FLRA, District Court Says*, 41 Gov’t Empl. Rel. Rep. (BNA) No. 2025, at 914 (Sept. 16, 2003).

president of AFGE.³⁹²

In July 2003, a Regional Director of the FLRA rejected a similar challenge by AFGE made in the form of a representation petition.³⁹³ In its brief, AFGE repeated the argument that Loy lacked the power to ban bargaining, and added alternatively that even if Loy had such authority, the FLRA should recognize the union for other representational purposes.³⁹⁴ Asked whether the FLRA had ever recognized AFGE where the union could not bargain, AFGE President Bobby Harnage replied, "It's a first for us. Before this administration, we didn't have this problem"³⁹⁵ Harnage insisted that FLRA's rejection of AFGE's petition "has absolutely no impact on AFGE's organizing campaign. The campaign can't be stopped and it won't be stopped."³⁹⁶ In November, 2003, a divided FLRA upheld the Regional Director's decision, ruling that since the head of the TSA had banned collective bargaining, the FLRA was without jurisdiction to grant union representation petitions for TSA employees.³⁹⁷

b. What Will Federal Sector Unions Do, If Not Bargain?

In the event that Loy's Order remains unchanged, AFGE officials have laid out an agenda for the union that is directly out of the first half of the twentieth century. AFGE says it will represent TSA employees in grievance hearings or whatever forum is provided to deal with labor issues, and will represent members in lawsuits under various modern era employment laws ranging from workers compensation to anti-discrimination laws.³⁹⁸

392. Press Release, American Federation of Government Employees, Court Tells AFGE to Go Back to FLRA; Union Files Appeal With FLRA (Sept. 5, 2003), at <http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=279> (last visited Feb. 1, 2004).

393. Donald G. Aplin, *TSA Screeners Have No Bargaining Rights; Authority Rejects Representation Petitions*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2017, at 723 (July 15, 2003).

394. Donald G. Aplin, *AFGE Charters National Air Screener Local, Challenges Legality of TSA Bargaining Ban*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2000, at 253 (Mar. 11, 2003).

395. *Id.* at 254.

396. Donald G. Aplin, *TSA Screeners Have No Bargaining Rights; Authority Rejects Representation Petitions*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2017, at 723 (July 15, 2003).

397. DHS and AFGE, FLRA (No. WA-RP-03-0023, Nov. 4, 2002); *Authority Affirms Rejection of TSA Representation Petitions*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2036, at 1202 (Dec. 12, 2003).

398. See Donald G. Aplin, *AFGE Charters National Air Screener Local, Challenges Legality of TSA Bargaining Ban*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2000, at 253 (Mar. 11, 2003); Ramstack, *supra* note 257, at A1; T. Shawn Taylor, *In the Name of Homeland Security; Fed Workers Say They're Treated as Soldiers Under New Department*, CHI. TRIB., Mar. 9, 2003, at C5.

How well will this work? So far, the two sides have butted heads in a not particularly productive manner. On June 11, AFGE filed a federal court suit alleging that TSA managers disciplined a Pittsburgh screener for engaging in protected union activity while off-duty, in violation of the First Amendment.³⁹⁹ TSA spokesperson Nico Melendez responded that workers had the right to join a union, but added, not reassuringly, “there’s nothing we can do about that.”⁴⁰⁰ On August 13, AFGE filed a separate class action suit against the TSA, alleging that its reduction-in-force procedures violate the Aviation and Transportation Security Act, Veterans’ Preference Act, Age Discrimination in Employment Act, and the First and Fifth Amendments of the Constitution.⁴⁰¹ “TSA management is using its staff reduction to remove employees they don’t like, despite their performance record,” said Harnage.⁴⁰² “It’s not what you know, but who you know.”⁴⁰³ Indeed, it appears that currently evolving labor-management relations in the TSA are counterproductive and inefficient. A review of the history of federal sector labor relations could well show that bargaining rights are the solution, not the problem.

V. CIVIL SERVICE

Many of the lessons from public sector labor relations are applicable to civil service rules. Civil service laws have existed at the state and federal levels for even longer than public sector bargaining laws; they were created for good reasons and supported by a broad consensus of political opinion. There is no evidence that the existence of these rules has created any security problems. In late 2003, it was estimated that almost one million federal employees would be taken out of the federal civil service system once the DHS and DOD established their alternate personal systems.⁴⁰⁴ Again, the parties should study jurisdictions that have had these

399. Complaint for Declaratory Judgment and Injunctive Relief, *AFGE TSA Local 1 v. Loy*, No. 030976 (W.D. Pa. Jun. 11, 2003).

400. Donald G. Aplin, *AFGE Challenges Ridge to Restore Screener Rights in DHS Workforce Reform*, 41 Gov’t Empl. Rel. Rep. (BNA) No. 2014, at 630 (June 17, 2003). On the other hand, Loy met with AFGE officials and agreed to allow deductions of payroll dues for workers who joined a union. Donald G. Aplin, *TSA to Cut 6,000 Federal Airport Screeners; Budget Constraints, Efficiency Drive Change*, 41 Gov’t Empl. Rel. Rep. (BNA) No. 2008, at 475 (May 6, 2003).

401. Class Action Complaint for Declaratory Judgment and Injunctive Relief, *AFGE v. Loy*, No. 1-03-01719, 173 L.R.R.M. 2358 (D.D.C. Aug. 13, 2003), available at http://www.afge.org/Documents/TSA_LeimervLoy.pdf (last visited Feb. 1, 2004).

402. Press Release, *AFGE Fights Illegal Layoffs at TSA* (Aug. 13 2003), available at <http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=269> (last visited Feb. 1, 2004).

403. *Id.*

404. *Creation of DOD, DHS Personnel Systems Will Impact Board’s Role*, New Report

laws and those that have not before jettisoning procedures and protections that were developed over more than a century ago.

Obviously, the history of federal practices is relevant. Margaret Rung's detailed study of the federal civil service system in the first half of the 20th century describes tensions between merit ideals and the desire of agency heads to make political appointments.⁴⁰⁵ She also notes that civil service protections were often not sufficient to prevent various forms of discrimination.⁴⁰⁶ But also, the experiences of state governments should not be ignored. These experiences underscore the importance of civil service protections not only for workers but for effective public service.

A. *Why State Civil Service Rules Developed and Why They Were Strengthened*

State governments adopted civil service systems for the same reasons as the federal government: to replace the spoils system with the merit system. Illinois actually adopted its law under circumstances remarkably similar to those that led to the federal Pendleton Act; the state passed the "Optional Civil Service Act for Cities" in 1895 after Mayor Carter Harrison of Chicago was killed by a disappointed office-seeker.⁴⁰⁷ Illinois then passed a civil service law for state employees in 1905.⁴⁰⁸ Other states that passed similar laws early on included New York, which passed the first such law in 1883, Massachusetts in 1884, Wisconsin in 1905, New Jersey in 1908, California and Ohio in 1913, Kansas in 1915, and Maryland in 1920.⁴⁰⁹ By 1944, nineteen states had adopted civil service systems, as had hundreds of cities.⁴¹⁰ In 1948, eleven more states adopted such systems.⁴¹¹

Thus, even in the first half of the century, governments at all levels increasingly rejected political cronyism and embraced merit as a way to improve government services. Political machines came under increasing pressure. For example, Franklin Roosevelt's forces successfully pressed civil service rules on unsympathetic state and local Democratic bosses.⁴¹² Reformers wanted a more efficient government, one with a personnel

Says, 41 Gov't Empl. Rel. Rep. (BNA) No. 2037, at 1210 (Dec. 9, 2003).

405. RUNG, *supra* note 58, at 73-74.

406. *Id.*

407. JOSEPH POIS ET AL., THE MERIT SYSTEM IN ILLINOIS 5, 25-27 (1935).

408. *Id.* at 27.

409. *Id.* at 5.

410. Joseph Slater, Down by Law: Public Sector Unions and the State in America, World War I to World War II 123-24 (1998) (Ph.D. dissertation, Georgetown University), microformed on UMI No. 9924382 (Univ. Microforms Int'l) (citing several studies of civil service systems).

411. MARTIN SHEFTER, POLITICAL PARTIES AND THE STATE: THE AMERICAN HISTORICAL EXPERIENCE 81 (1994).

412. *Id.* at 82-83.

system that could hire and retain competent and effective workers.⁴¹³

The inadequacies of some early state and local civil service systems are also instructive for modern debates. Some laws excluded large numbers of public workers. Even by the late 1950s, only 51-65% of all government employees were covered by civil service rules.⁴¹⁴ Also, those covered often received surprisingly few rights. In the 1930s, the Illinois law only allowed appeal of a discharge motivated by racial, religious, or political reasons, and the Wisconsin law only covered religious or political motivations.⁴¹⁵ Without general "just cause" protection, it was relatively easy to trump up charges.⁴¹⁶ A 1935 study of the civil service in Chicago and Cook County, Illinois, found that "Spoils Politics ha[d] ham-strung the merit system."⁴¹⁷ One key flaw was that elected officials exercised political control over civil service coverage.⁴¹⁸

Here again, a key impediment to the adequate protection of worker rights in the public sector was the ability of public officials to make effective "law" for their own employees. In the civil service context, cities often set their own civil service standards.⁴¹⁹ As with labor relations rules, this allowed the bosses of local political machines to write or administer rules so that they retained significant power. Therefore, as one study concluded, many states "accepted the merit principle in name only,"⁴²⁰ and patronage remained a real problem during much of the twentieth century.

While the big city machines in Chicago (Daley) and New York (Tammany Hall) were the most infamous, inadequate civil service protections created patronage problems in towns of all sizes. Examples can be seen through the eyes of members of the Building Service Employees International Union (BSEIU) in the 1930s. The BSEIU represented janitors and other service workers in public employment, and it often confronted patronage.⁴²¹ BSEIU officer Elizabeth Grady complained, "Politics prevails in all these public jobs."⁴²² Workers across the country supported this claim. In St. Louis in 1938, BSEIU members wrote that in the city sanitarium, "[a]ttendants [were] given their jobs through the various

413. *Id.* at 84.

414. SLATER, *supra* note 14, at 125 (citing LEO KRAMER, LABOR'S PARADOX: THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO 29-30 (1962)).

415. *Id.* at 125-26 (citing sources discussing the merit system).

416. *See* KRAMER, *supra* note 414, at 11, 27.

417. *Id.*

418. SLATER, *supra* note 14, at 117.

419. SOLOMON FABRICANT, THE TREND OF GOVERNMENT ACTIVITY IN THE UNITED STATES SINCE 1900 91 (Nat'l Bureau of Econ. Research, No. 56, 1952).

420. Slater, Down by Law, *supra* note 410, at 126 (citing DANIEL R. GRANT & H.C. NIXON, STATE AND LOCAL GOVERNMENT IN AMERICA 349 (1967)).

421. SLATER, *supra* note 14, at 97-124.

422. *Id.* at 115.

Aldermen and Committeemen" who demanded obedience to "ward organizations."⁴²³ Around the same time in San Antonio, all the employees in the county courthouse were fired after a new sheriff took over and decided to hire his friends.⁴²⁴ BSEIU officer Paul David summed up the problem: "If one party is in power they want their friends taken care of in the city jobs, and if the other party gets in power, they want their friends taken care of."⁴²⁵

Thus, public workers fought for civil service coverage throughout the twentieth century. When they achieved coverage, it was a real victory for employee rights and better government service. After winning civil service protection, one janitor remarked that "we are no longer compelled to pay tribute to some politician to hold our jobs."⁴²⁶

B. Modern Debates: A Return to Patronage?

In the DHS debates, there were only a handful of references to the history and purpose of civil service rules. Representative Albert Wynn (D-Md.) noted that the DHS law gives "managers unilateral authority to write their own rules" and thus "allows an immense bureaucratic fiefdom to be created in which managers can bestow favors on their cronies"⁴²⁷ Representative Louise Slaughter (D-N.Y.) added that civil service "protects Americans against the spoils system" and that the DHS should "be staffed by professionals, not the political cronies of whichever party happens to hold the White House."⁴²⁸ Jacqueline Simon of AFGE said that civil service rules ensured that "winning a federal job is a matter of what you know, not whom you know" and that career development would be based on merit, not "political affiliation or union status."⁴²⁹

Meanwhile, advocates of the DHS bill propounded theories that ignored the history of problems that civil service protections were created to combat. The Heritage Foundation's report explicitly called for increased politicization and fewer civil service rights in the federal service. The report rejected the merit principle even in theory. The "whole

423. *Id.* at 115-16.

424. *Id.* at 116.

425. *Id.*

426. *Id.*; see also *id.* at 116-17 (noting that the BSEIU and other public sector unions lobbied for civil service laws); KRAMER, *supra* note 414, at 27 (attributing civil service reforms to AFSCME lobbying efforts in the 1930s).

427. 148 CONG. REC. H8593 (daily ed. Nov. 13, 2002).

428. *Id.* at H8591.

429. *Compensation Reform: How Should the Federal Government Pay Its Employees?: Hearing Before the House Subcomm. on Civil Serv. and Agency Org. Comm. on Gov't Reform*, 108th Cong. 134 (2003) (statement of Jacqueline Simon, Public Policy Director, AFGE), available at <http://a257.g.akamaitech.net/7/257/2422/14sep20031230/www.access.gpo.gov/congress/house/pdf/108hr/89241.pdf> (last visited Feb. 1, 2004).

governmental apparatus must be managed" on the principle of "loyalty first and expertise second."⁴³⁰ Indeed, "[p]icking appointees who are 'best for the job' merely in terms of expert qualifications can be disastrous . . . because the best qualified are . . . part of the status quo . . ."⁴³¹ Most relevant here, the report stated, "Political appointees should make key management decisions . . ."⁴³²

In addition, the report was highly skeptical of the right of workers to oppose unbridled management discretion. It criticized the fact that the "civil servant . . . has been empowered to police his environment, blow the whistle on his employer . . . and even initiate retaliatory complaints against a hated manager or supervisor."⁴³³

This report made no mention of historical problems with patronage. But conservatives as well as liberals should be worried about a return to patronage if civil service protections are weakened. Most obviously, conservatives could be disfavored in a liberal administration. More generally, conservatives should agree that in government employment, where there is often less of a direct, "bottom line" accountability than in private markets, the prospect of managers firing workers for reasons unrelated to merit is especially worrisome.⁴³⁴

Both sides should investigate history. Senator Lieberman argued that "the civil service evolved for a reason. It was designed to . . . protect the Federal workforce from favoritism, from patronage, from politicization . . ."⁴³⁵ Senator Feingold agreed that civil service was created "to end the corrupt patronage system that had permeated government hiring and advancement."⁴³⁶ Senator Daschle worried that the DHS bill "would return us to an era when patronage and political cronyism ran the Federal workforce."⁴³⁷ History shows that civil service did help prevent such problems, in state government as well as federal.

Once more, a key historical lesson is that giving public officials too

430. Nesterczuk, *supra* note 62, at 9.

431. *Id.* at 9-10.

432. *Id.* at 3.

433. *Id.* at 18.

434. Discriminating against public employees who are not in policy-making positions explicitly on the basis of party affiliation violates the First Amendment. *Rutan v. Republican Party*, 497 U.S. 62 (1990). But this Constitutional protection would not be adequate to stop those who would make ideology a driving factor in federal employment decisions. First, this protection is significantly more narrow than general protection on the basis of merit that civil service rules provide. Second, civil service systems also provide administrative procedures to adjudicate the substantive rights provided, because employees are more likely to try to enforce their rights in an administrative forum rather than in more lengthy and costly court litigation.

435. 148 CONG. REC. S8070 (daily ed. Sept. 3, 2002).

436. 148 CONG. REC. S9687 (daily ed. Oct. 1, 2002).

437. 148 CONG. REC. S10,621 (daily ed. Oct. 17, 2002).

much power to set employment rules for their own employees is fraught with peril. As Senator Bingaman noted, "There are no protections against management that use the 'flexibility' available in this bill to settle a personal or professional grudge."⁴³⁸ The law risked creating "a system based on individual whims and not established law."⁴³⁹ Today, rank-and-file workers are afraid. In May 2003, screeners at Pittsburgh International Airport, which was slated to lose 40% of its screeners, expressed fears that "cronyism" would determine who was let go and who would be retained.⁴⁴⁰

VI. CONCLUSION: LEARNING FROM THE LABORATORIES OF DEMOCRACY

The future is unsettled. The DHS has yet to make final its personnel system, litigation regarding the TSA is pending, and debates continue regarding the DOD. Again, the issue of how to design these personnel policies is important not just for the workers and agencies involved, but also for labor relations generally. The debates should be informed by the history and experience of various types of unions, employers, and bargaining regimes, as well as civil service systems.

One could conclude that these disputes center more on partisan politics than the desire to create a better personnel system. "Let's face it," Senator Byrd said during the DHS debates, "the players in this administration do not have much of a reputation as champions of basic protections for workers."⁴⁴¹ Senator Ted Kennedy (D-Mass.) said of the TSA's ban on bargaining, "It's not homeland security, it's union busting."⁴⁴² Senator Daschle added that the DHS bill sought to "exploit the issue of homeland security in order to advance a preexisting ideological agenda . . . that is anti-worker and obviously anti-union."⁴⁴³ On the other side, Senator Gramm claimed that "the reason this has become such a contentious issue" was that it involved "one of the most powerful political forces in America—the public employee labor unions."⁴⁴⁴

But there are signs of opportunities for a more informed debate in the future. Senator Arlen Specter (R-Pa.) has said that he may introduce

438. 148 CONG. REC. S11,373 (daily ed. Nov. 19, 2002).

439. *Id.* (statement of Sen. Bingaman).

440. Romy Varghese, *LVA Losing 26 Security Screeners*, MORNING CALL (Allentown, PA), May 6, 2003, at A1.

441. 148 CONG. REC. S7729 (daily ed. July 31, 2002); *see also* AFL-CIO, Bush Watch, at <http://www.aflcio.org/issuespolitics/bushwatch/index.cfm> (last visited Feb. 1, 2004) (critiquing Bush administration policies).

442. Associated Press, *Airport Screeners Forbidden From Unionizing, TSA Chief Says*, (Jan. 10, 2003), available at http://www.afge.org//index.ofm?page=airportScreeners&File=2003_01_10_a.htm (last visited Oct. 27, 2003).

443. 148 CONG. REC. S10,621 (daily ed. Oct. 17, 2002).

444. 148 CONG. REC. S9373 (daily ed. Sept. 26, 2002).

amendments revisiting the statutory language on collective bargaining in the DHS during the 108th Congress.⁴⁴⁵ Senator George Voinovich (R-Ohio) stated, "If we do not resolve some of the differences between the administration and the unions, the chances of this new agency being successful are remote."⁴⁴⁶ He encouraged President Bush to meet with union officials.⁴⁴⁷ "As a mayor and governor, I went through reorganizations, and I learned that you cannot get it done unless you have built trust with your labor union members."⁴⁴⁸ Notably, Voinovich is from a state where public workers have broad bargaining rights.⁴⁴⁹ On the union side, NTEU national counsel Michael McAuley has recently stated that federal sector labor laws could stand "at least substantial scrutiny," and the union's message was that "it's a huge missed opportunity not to include federal employees in this change."⁴⁵⁰

The new personnel rules in these agencies may be quite different from the old rules. Or perhaps further considerations will result in something similar to the original system. Speaking with regard to the DHS, Peter Levine, general counsel of the Senate Armed Services Committee, recalled that when the FAA was largely exempted from civil service rules, it made considerable efforts to create a new personnel system, but in the end, it "looked a lot like the system it replaced."⁴⁵¹ The point, however, is that in making further considerations, policymakers should be informed by a history that is not compartmentalized. They should use data from the states in their role as laboratories of democracy, as well as from all relevant private and public sector employment in America. They should see how their concerns have been addressed in the real world instead of relying on disproved caricatures and outmoded arguments. Only this can ensure optimal results for the workers, the agencies, and the public.

445. 148 CONG. REC. S11,012 (daily ed. Nov. 14, 2002).

446. 148 CONG. REC. S11,184 (daily ed. Nov. 15, 2002).

447. *Id.*

448. *Id.*

449. See OHIO REV. CODE ANN. tit. 41, § 4117.08 (2001) (noting that bargaining over a wide range of issues is allowed); see also §§ 4117.03(A)(4), 4117.14 (outlining rights for many public workers, including mediation, factfinding, and binding arbitration for impasse resolution).

450. Donald G. Aplin, *Panelists Eye Role of Unions, Merit Board, FMCS at Homeland Security Department*, 41 Gov't Empl. Rel. Rep. (BNA) No. 2027, at 988 (Sept. 30, 2003).

451. *House Passes New HSD Measure; Senate Expected to Follow Suit*, 40 Gov't Empl. Rel. Rep. (BNA) No. 1985, at 1115 (Nov. 19, 2002).